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In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1310

CLABER DISTRIBUTING COMPANY,
Appellant,

vs.

RUBBERMAID, INC.,
Appellee.

JURISDICTIONAL STATEMENT

On Appeal from the Supreme Court of the State of Ohio.

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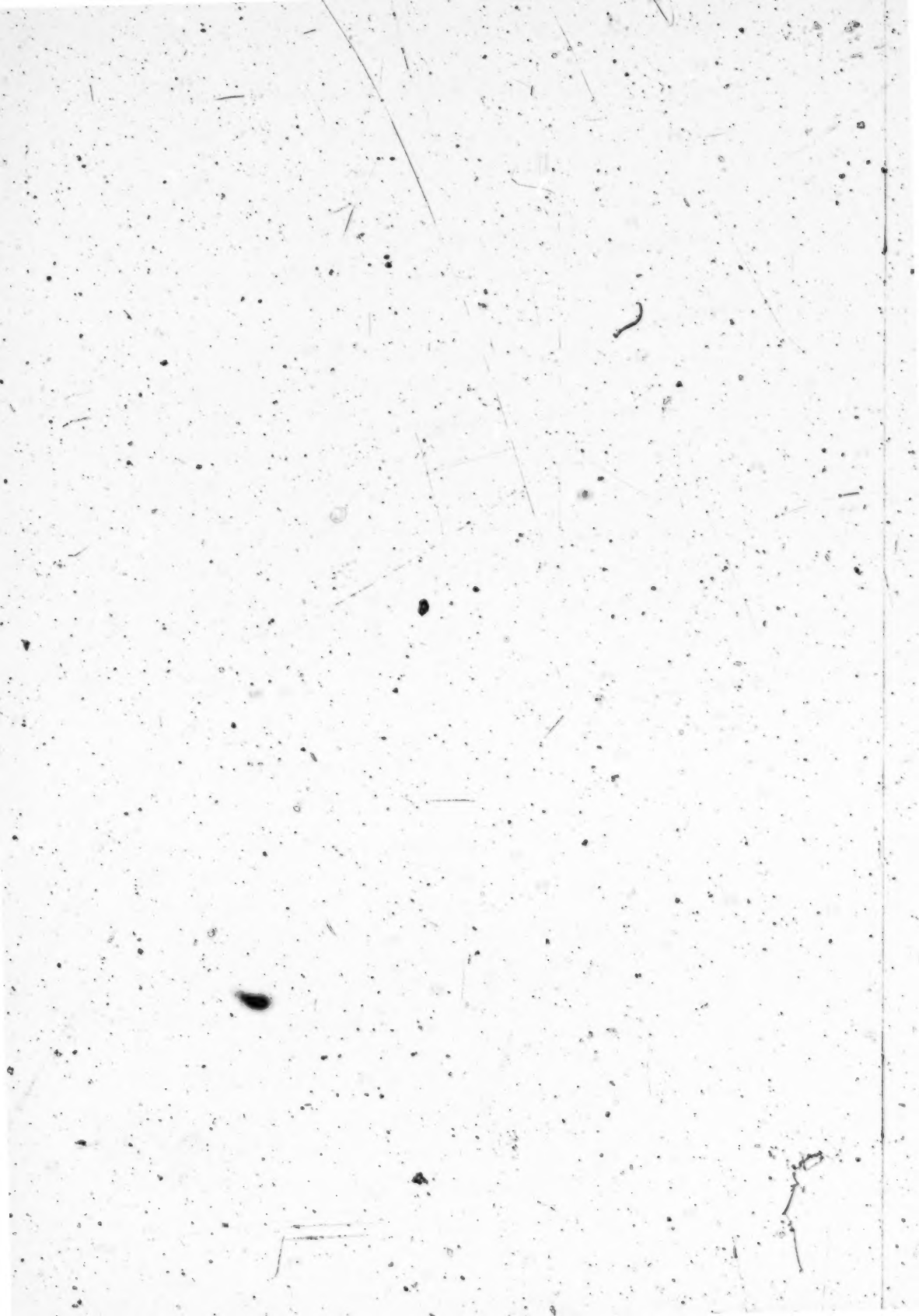

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JURISDICTIONAL STATEMENT.

Appellee, Rubbermaid, commenced this action in 1963 under the so-called Ohio "Fair Trade" Act of 1959 to obtain injunctive relief and damages, including attorney fees, from Appellant, Claber, a non-signator of a "fair trade" contract, for the alleged failure to maintain Rubbermaid's fixed resale prices.

Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the trial court, the Common Pleas Court of Cuyahoga County, Ohio, of March 5, 1965, granting a conditional injunction, is reported officially in 3 Ohio Misc. 39, unofficially at 205 N. E. 2d 41, and is printed in the Appendix hereto at page 5a. A supplemental opinion of the trial court of May 12, 1965, dismissing Rubbermaid's application for an order directing

Claber to pay reasonable attorney fees is not reported and is printed in the Appendix hereto at page 29a. A further oral opinion of the trial court of July 22, 1965, cancelling the conditional injunction and denying Rubbermaid's prayer is not reported and is printed in the Appendix at page 37a. The Memorandum Opinion of the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, granting an injunction and allowing attorney fees, is unreported and is printed in the Appendix hereto at page 41a. The Supreme Court of Ohio did not write an opinion.

JURISDICTION.

This action was commenced in 1963 by Rubbermaid under the so-called Ohio "Fair Trade" Act of 1959, §§ 1333.27 through 1333.34, of the Ohio Revised Code, 128 Ohio Laws 696 through 702, to obtain injunctive relief and damages, including attorney fees, from appellant, Claber, a non-signator of a "fair trade" contract, for Claber's alleged failure to maintain Rubbermaid's fixed resale prices.

The judgment of the Supreme Court of Ohio was entered November 1, 1967, dismissing an appeal as of right and overruling a motion to certify the record. A motion for rehearing, timely filed, was denied on November 29, 1967. Notice of appeal was filed with the Supreme Court of Ohio on February 26, 1968. The time within which this case might be docketed with the Supreme Court of the United States was extended, upon application timely filed, to and including April 12, 1968.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, § 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judg-

ment on direct appeal in this case: *Bantam Books, Inc., v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631 (1963); *People of State of Ill., ex rel. McCollum v. Bd. of Ed. School Dist. No. 71, Champaign Cty., Ill.*, 333 U. S. 203, 68 S. Ct. 461 (1948); *Charleston Federal Sav. & Loan Assn. v. Alderson*, 324 U. S. 182, 65 S. Ct. 624 (1945); *Fiske v. State of Kansas*, 274 U. S. 380, 47 S. Ct. 655 (1927); *Tumey v. Ohio*, 273 U. S. 519, 47 S. Ct. 437 (1927); *Kansas City Southern Ry. Co. v. Road Improvement Dist., No. 3, of Sevier Cty., Arkansas*, 266 U. S. 379, 45 S. Ct. 136 (1924); *Western Turf Assn. v. Greenberg*, 204 U. S. 359, 27 S. Ct. 384 (1907).

The statute, the validity of which is challenged herein, is § 1333.32(B) of the Ohio Revised Code, 128 Ohio Laws 698 (701), which provides:

> "Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> (1) Recover the amount of damages sustained as a result thereof;
>
> (2) Obtain injunctive relief whether or not specific monetary damages are established;
>
> (3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established."

This provision is part of the so-called Ohio "Fair Trade" Act, §§ 1333.27 through 1333.34, of the Ohio Revised Code, which is reproduced in its entirety in the Appendix hereto at page 52a.

QUESTIONS PRESENTED.

1. Is § 1333.32(B) of the Ohio Revised Code, to the extent that it purports to authorize an award of attorney fees to a successful plaintiff only, an unreasonable denial of due process and the equal protection of the law, contrary to the Fourteenth Amendment of the United States Constitution?

2. Does the conduct of a proprietor which engages in a course of business whereby concessions in the form of favorable prices and demonstrator and advertising allowances are made available only to a certain arbitrarily limited class of direct buying retailers, including its largest Ohio retailer, and excluding Claber, constitute an illegal act of unfair competition, such as to bar injunctive relief against Claber, a non-signer retailer?

3. Where, on an appeal on questions of law only, a reviewing court reverses a trial court's denial of discretionary injunctive relief and attorney fees in an action pursuant to § 1333.27, et seq., of the Ohio Revised Code, absent a finding of a plain abuse of discretion, with such reversal based solely upon "prejudicial error," has there been a denial of due process and the equal protection of law as guaranteed by the Fourteenth Amendment of the United States Constitution?

4. Does the giving of trading stamps, having a value of 4.34% of the sales price, in connection with the sale of articles subject to a resale price maintenance program in accordance with §§ 1333.27, et seq., of the Ohio Revised Code, exceed the 3% limitation contained in § 1333.32(A) and, thus, constitute an act of unfair competition sufficient to bar injunctive relief?

5. Where a proprietor has knowingly acquiesced in and consented to the practice of its largest Ohio retailer

(with which it has a signed "fair trade" contract) in the giving of trading stamps in excess of the 3% limitation of § 1333.32(A), of the Ohio Revised Code, is such conduct indicative of a lack of diligence and good faith in enforcement, constituting an abandonment of its fair trade policy, sufficient to bar injunctive relief against a non-signer retailer alleged to have made sales below the proprietor's stipulated minimum resale prices?

6. Does a proprietor which has established a minimum resale price maintenance policy indicate a lack of good faith and diligence, constituting an abandonment of its fair trade policy, sufficient to bar injunctive relief against a non-signer retailer, when it unilaterally, temporarily and substantially varies its so-called "fair trade" prices from time to time, during certain periods designated "special promotions"?

7. Does a proprietor who maintains a minimum resale price maintenance program pursuant to § 1333.27, et seq., of the Ohio Revised Code, and who undertakes to market some products as "promotional items" under the same trade name and trade mark utilized in connection with fair trade items, at lower prices than under its fair trade program, which products are virtually identical with those "fair traded" at substantially higher prices, thus indicate a lack of diligence and good faith in its resale price maintenance program, constituting an abandonment thereof, sufficient to bar injunctive relief against a non-signing retailer?

STATEMENT.

Appellant, Claber, owns and operates several large, modern, self-service retail stores in and around Cuyahoga County (Cleveland), Ohio. These stores offer a very full line of merchandise in attractive surroundings, primarily at outlying suburban locations. This firm is typical of retail operations which have developed over the past decade and a half which sell merchandise, utilizing self-service, cash and carry sales only, at locations outside high rent districts. Savings incurred as a result of the method of operation are passed along to the consumer through lower mark-ups and, consequently, lower prices.

Appellee, Rubbermaid, manufactures and distributes a quality line of plastic and rubber housewares. Its products are extensively nationally advertised and in demand by consumers. It has long been Rubbermaid's policy to "fair trade" its houseware products where permitted. In those states where possible, Rubbermaid requires an executed agreement with a retailer to maintain minimum resale prices.

In Ohio, pursuant to § 1333.24, et seq., of the Ohio Revised Code, in addition to signed "fair trade" contracts, a retailer is deemed bound upon receipt of notice from a manufacturer of a minimum stipulated resale price, even in the absence of a contractual relationship. Mere acquisition of merchandise with notice of the minimum resale prices stipulated by the manufacturer is deemed conclusive evidence of actual notice. Pursuant to said sections, it is made unlawful and an act of unfair competition for any retailer with such notice of minimum resale prices to sell such commodity at less than stipulated minimum resale price.

Claber declined to enter into an agreement with Rubbermaid to maintain minimum resale prices. Thereafter,

Claber sought, acquired when it was able (despite Rubbermaid's efforts to cut-off Claber's sources of supply), and sold Rubbermaid products at retail prices below the fixed minimum resale prices unilaterally established by Rubbermaid, in conformity with its uniform merchandising policies. Rubbermaid commenced this action to obtain injunctive relief and damages, including attorney fees, from Claber for the alleged failure to maintain such fixed minimum resale prices.

At the trial level, Claber alleged and established that, with Rubbermaid's *knowledge, consent, acquiescence* and *participation,* the May Company (Rubbermaid's largest Ohio retailer) had continually violated its *signed* minimum resale price maintenance contract as well as § 1333.32(A), of the Ohio Revised Code, by giving concessions in the form of double trading stamps on Tuesdays having a value of 4.34% of the sale price, *well in excess of the 3% limit set forth in §1333.32(A).* This limited exception was specifically inserted by the Ohio General Assembly to make possible the giving of some trading stamps, but only in a specifically limited amount, to-wit:

> "* * * provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed 3% of such stipulated resale price * * *."

Reference to this provision's legislative history puts to rest any dispute as to the legislature's intention. Moreover, Rubbermaid itself unequivocally interpreted the limitation contained in the statute by spelling out the precise procedure in its written contract with the May Company.

Claber also alleged Rubbermaid's abandonment of its minimum resale price maintenance program with respect to certain promotional items (ostensibly outside the "fair

trade" program) and that Rubbermaid itself varied its minimum resale prices, from time to time, by approximately one-third during periods of so-called "special promotions."

It also developed during the course of the trial that the May Company and Rubbermaid enjoyed a mutually advantageous relationship; that the May Company is Rubbermaid's largest Ohio retailer; that it is one of a few of Rubbermaid's favored customers permitted to purchase directly from Rubbermaid, avoiding jobbers, with concomitant financial benefits; that the May Company receives substantial promotional allowances and credits not available to most other Rubbermaid retailers; that as one of those benefits, the May Company has full time employees called "Rubbermaid demonstrators" on its sales staff. These people are either on Rubbermaid's payroll or the May Company receives 100% reimbursement for all payroll costs from Rubbermaid. While ostensibly these individuals' primary duty is the promotion and sale of Rubbermaid products, in practice they are indistinguishable from all other May Company sales personnel. They sell other products as well as Rubbermaid and significantly participate in May Company's practice of giving double trading stamps for cash purchases of all products on Tuesdays, including those which are "fair traded." It is this practice that the trial court found *inconsistent* with the resale price maintenance program pursuant to § 1333.27, et seq., of the Ohio Revised Code

On the state of the record, the trial concluded that Rubbermaid had, in fact, *knowingly permitted, acquiesced and participated* in the May Company's violation.

At the conclusion of the trial, the court sustained Claber's defenses in part and initially granted Rubber-

maid a conditional injunction to take effect on a future stated date, unless, at further hearings to be held, it was determined that Rubbermaid's "consent or acquiescence" with respect to the practice of the May Company Department Stores in Cuyahoga County, in violation of § 1333.27, et seq., of the Ohio Revised Code, and the signed Rubbermaid retail price maintenance contract, had not ceased. The question of damages, including attorney fees, was reserved for further consideration of the court by stipulation of the parties.

Thereafter, Rubbermaid applied for an order requiring Claber to pay attorney fees of its counsel in this litigation, having relinquished its claim of damages. The trial court upheld the validity of the statute, allowing the recovery of attorney fees, but held that it was a matter that should be governed by the exercise of sound judicial discretion. Further, the court stated that in the exercise of such discretion, based upon Claber's good faith in defense of the action, it would dismiss the application for attorney fees.

Subsequently, hearings were held pursuant to the court's original order allowing a conditional injunction, at the conclusion of which the court found that the conditions of *consent* and *acquiescence* in the violation by Rubbermaid's largest Ohio retailer, the May Company, persisted and the court entered an order denying Rubbermaid any injunctive relief.

Thereafter, Rubbermaid appealed on questions of law only on a very skeleton bill of exceptions, to the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, on the issue of whether the giving of double trading stamps in an amount in excess of the limit set forth in § 1333.32, Ohio Revised Code, constitutes a violation of

the 1959 "Ohio Fair Traded-Minimum Resale Price Act" and also from the trial court's refusal to award attorney fees.

The Court of Appeals found "error prejudicial to the plaintiff," holding that the violation of the "fair trade" Act by one retailer should not have been considered by the trial court as a bar to injunctive relief; that the giving of double trading stamps in the amount of 4.34% in excess of the 3% limit of § 1333.32 was not a violation of the Ohio "Fair Trade" Act; that Rubbermaid had exercised reasonable diligence in enforcing its "fair trade" program and was thus entitled to injunctive relief.

The Court of Appeals remanded the case to the trial court with instructions to grant an injunction as prayed for and "to determine a reasonable amount of attorneys fees to which plaintiff is entitled."

It is significant to note that in arriving at this conclusion, the Court of Appeals failed to find an *abuse of discretion*. Instead, it found only error prejudicial to the plaintiff, in an appeal on questions of law only. It was urged in the Court of Appeals and in the Supreme Court of Ohio that "abuse of discretion" and "prejudicial error" are separate and distinct principles; and that the latter is not a sufficient basis upon which to reverse a trial court's denial of discretionary injunctive relief, and denial of discretionary attorney fees. The Court of Appeals, on an appeal on questions of law only, did not even have an opportunity to consider the trial record *de novo* in order that it might determine whether or not the trial court abused its discretion. This is of particular significance with respect to the Court of Appeals' decision pertaining to the award of attorney fees. Nowhere in the Memorandum to Lawyers (the Court of Appeals' opinion) is the subject of attorney fees even discussed except in the

final phrases which remanded the case to the Common Pleas Court with instructions to determine a reasonable amount of attorney fees to which the appellate court found Rubbermaid entitled.

The Supreme Court of Ohio dismissed an appeal as of right and overruled a motion to certify the record, as well as a motion for rehearing. Notice of appeal to the Supreme Court of the United States was filed with the Supreme Court of Ohio.

QUESTIONS PRESENTED ARE SUBSTANTIAL.

(1) Unconstitutionality of Statute Permitting Recovery of Attorney Fees.

Validity of § 1333.32(B) of the Ohio Revised Code was injected into this case by Rubbermaid's application in the trial court for recovery of costs of suit, including reasonable attorney fees. Claber directly challenged the constitutionality of said section in its motion to dismiss the application and its brief in support thereof wherein it stated that said section is unconstitutional in that it denied Claber due process and equal protection of the law. The trial court, in its opinion of May 12, 1965 (Appendix 29a) upheld the constitutionality of said section, but did determine that the statute vested discretionary authority in the trial court to award attorney fees and determined to exercise that discretion and deny attorney fees to Rubbermaid on the basis of Claber's good faith defense of the litigation.

Rubbermaid had requested, in its application, attorney fees in the amount of Twenty One Thousand Six Hundred Dollars ($21,600.00). Subsequently, they filed a supplemental application in the Court of Appeals for additional attorney fees in the amount of Thirteen Thou-

sand Five Hundred Forty Four Dollars and Thirty Eight Cents ($13,544.38).

The constitutionality of said section was in issue before the Court of Appeals by reason of Rubbermaid's assignment of error No. 2, "The trial court erred in holding that the plaintiff was not entitled to recover statutory attorney fees," and Claber's position set forth in its brief in the Court of Appeals contending that said section is unconstitutional as a denial of due process and the equal protection of the law. The Court of Appeals, in its Memorandum to Lawyers dated April 25, 1967, containing its decision, unfortunately, ignored the attorney fee issue in its entirety, except to find that in addition to injunctive relief, Rubbermaid was entitled to recover its reasonable attorney fees.

The issue was before the Supreme Court of Ohio by Item VIII in the Statement of Questions of Law Involved and Contentions of the Appellant, to-wit:

> "VIII. Section 1333.32(B), of the Ohio Revised Code, to the extent that it purports to authorize an award of attorney fees only to a successful plaintiff, is an unreasonable denial of the equal protection of the law and is thus unconstitutional and void."

The Supreme Court of Ohio disposed of this question by dismissing the appeal as of right on the basis that no substantial constitutional question was involved.

(2) Whether the Conduct of a Manufacturer Granting Favorable Prices and Promotional Allowances on a Discriminatory Basis to Its Customers Constitutes an Illegal Act of Unfair Competition, Such as to Bar Injunctive Relief Against Claber.

This issue was raised initially by virtue of Claber's Fourth Defense in its Answer to Rubbermaid's Amended Petition filed in the trial court. Said defense provided:

> "During all times herein concerned, plaintiff [Rubbermaid] has had in effect a system of pricing its "Rubbermaid" products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance."

The trial court noted in its opinion of March 5, 1965 (Appendix 25a) that:

> "* * * it is claimed discriminatory price discounts by way of demonstrator and advertising allowances favor certain retailers and classes of retailers."

The court found (Appendix 26a) that Rubbermaid sold direct to "department stores," but that by Rubbermaid's vague definition of the term, Claber and establishments similar to it were excluded, although they met all other criteria.

Further, the court found that Rubbermaid's direct purchasers which utilized the demonstrator allowance in effect purchased merchandise at 40% and 18% off list, which produced a substantially lower price than the 40% and 5% off list price available to non-direct purchasing

retailers. Upon consideration, the court found (Appendix 27a) that the demonstrator allowances were not "deliberately discriminatory nor intentionally harmful to the defendant." Likewise, the court found the 3% cooperative merchandising allowance available only to direct purchasing department stores non-discriminatory. Despite these conclusions contrary to Claber's assertions, the court ultimately denied Rubbermaid any injunctive relief.

THE QUESTIONS ARE SUBSTANTIAL.

1. The Ohio statute is the only fair trade act in this country which allows attorney fees as well as damages. 2 CCH Trade Reg. Rep. ¶ 6368 (1965). Attorney fees are allowable only to an enforcer and are allowed independent of proof of damages. The instant action represents but the second occasion of an award of attorney fees under this statute. To date the fees claimed are Twenty One Thousand Six Hundred Dollars ($21,600.00) in connection with the trial court litigation plus approximately Thirteen Thousand Five Hundred Dollars ($13,500.00) in addition in connection with the appellate litigation. In the only other known instance in Ohio of an award of attorney fees under this section, the award was Thirty Eight Thousand One Hundred Dollars ($38,100.00) in *Hudson Dists., Inc. v. Eli Lilly & Co.*, 1963 CCH Trade Cas. ¶ 70,871 (Ohio C. P. 1963).[1]

The uniqueness of Ohio's statute and the rarity with which the provision for the award of attorney fees has been utilized is deceiving as not until April 26, 1967

[1] This award was subsequently vacated and the case assigned for retrial when the direct interest of the trial judge in a non-discounting retail store located near the alleged violator's sister's store became known.

did the Supreme Court of Ohio have occasion to consider and decide several cases involving the constitutionality of the Ohio "Fair Trade" Act, §§ 1333.27, et seq., of the Ohio Revised Code. *Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio,* 9 Ohio St. 2d 67, 223 N. E. 2d 592, and *Olin Mathieson Chemical Corp., Winchester Western Div., v. The Ontario Store of Toledo, Ohio,* Vol. XL, Ohio Bar No. 11, p. 570. Those decisions injected new life into numerous fair trade cases which were languishing on the dockets of various trial courts throughout the State of Ohio. In addition, they opened the flood gates to the filing of large numbers of new cases. For instance, in October of 1967, at least fourteen new fair trade cases were filed in the United States District Court for the Northern District of Ohio, in Cleveland. In this context, the question as to the validity of the section allowing an enforcer to recover attorney fees (which was not an issue in those cases) as against a constitutional challenge of denial of due process and the equal protection of the law, becomes a vital concern not only to all retailers within the State of Ohio but to the state courts and the federal courts sitting in Ohio as well.

As a result of such a provision, a retailer, who undertakes to defend a "fair trade" action, does so at his peril. Not only must he consider the expense of his own defense, but also the fact that he will have to pay the manufacturer's legal fees in the event he is unsuccessful. That such a result was the intent of the sponsors of the legislation is indicative from the statement of one of the authors of the bill after the first award of attorney fees made in a "fair trade" case:

> "Counsel throughout the state of Ohio would do well to bear this [award of $38,100 in attorney fees] in

mind when advising clients on the merits of contesting actions commenced under the new fair trade act." [2]

It must be noted that the provision of the 1959 "fair trade" Act which permits allowance of attorney fees only to a successful plaintiff does so independently of a claim or proof of damages, and not as an element of damages. The statute purports to permit the allowance of attorney fees to the plaintiff as part of the costs of suit, even though, as here, monetary damages have not been established and are not now involved.[3]

Such a provision for the allowance of attorney fees may not be treated as a penalty because the Act does not undertake to provide for a penalty. The Act merely undertakes to establish, albeit by construction and fiction, contract rights between the plaintiff, the producer, and the defendant who may be sued. The Act then permits an action to be filed (1) for damages and/or (2) injunctive relief and (3) costs of suit, including reasonable attorney fees.

Anticipating the defect in allowing attorney fees separate and apart from any monetary damages, this tailor-made Act undertakes to pull itself up by reciting that the

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[2] Gorrell & Brown, "A re-examination of fair trade legislation in the context of the new Ohio Fair Trade Act and the decision in *Hudson Dists., Inc. v. Upjohn Co.*" 15 W. Res. L. Rev. 84 (1963) at 99.

[3] Ostensibly § 1333.32 (B) contains language to the effect that "any person" may bring suit. This, however, does not change the clear meaning, inasmuch as "any person" in the context of the statute is limited to a person suffering or anticipating damage by reason of violation of the section, which must be a "proprietor," i.e., one who establishes minimum resale prices for a commodity. As a result, only a successful plaintiff can recover attorney fees and a plaintiff can only be from a limited class of litigants composed of manufacturers and producers of trade marked products.

costs and attorney fees may be recovered whether or not specific monetary damages are established. Significantly, statutes providing for the taxation of attorney fees as costs have been held unconstitutional as class legislation, on the ground that the fees were taxable in favor of or against only one of the parties to the action. 14 O. Jur. 2d *Costs*, § 35, page 32.

In *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255 (1897), an Act providing that railway companies failing to pay claims for less than Fifty Dollars ($50.00) within thirty days of presentation thereof, shall be liable for attorney fees not exceeding Ten Dollars ($10.00), was held void as depriving such companies of the equal protection of the law.

So, too, in *Missouri Pacific Ry. v. Tucker*, 230 U. S. 340, 33 S. Ct. 961 (1913) wherein it was held that a Kansas statute imposing a liability of Five Hundred Dollars ($500.00) as liquidated damages together with reasonable attorney fees for every charge by a common carrier in excess of specified rates, takes property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution.

In Ohio, a statute which allowed a fee not in excess of Five Dollars ($5.00) for plaintiff's attorney in an action for wages was held unconstitutional and void in *Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263.

In the context of § 1333.32(B) the special favored class of litigants is the producer or manufacturer who establishes a minimum resale price for his products. Similarly, under said section, the special class of litigants which is penalized is retailers. In the vast majority of "fair trade" cases, retailers find themselves pitched against large national corporations of unlimited resources. They

must thus not only contemplate financing their own defense, but also hazard the risk of paying the manufacturer's expenses too. As a result, they clearly defend at their peril, and are discouraged from defending such suits.

It is noteworthy that the Ohio statute in question is unlike that most recently before this Court (42 U. S. C. § 2000a-3(b)) in *Newman v. Piggie Park Enterprises*, __ S. Ct. __, 36 LW 4243, which provides that the "prevailing party" may be entitled to reasonable attorney fees.

2. As an affirmative defense in its Answer to Rubbermaid's Amended Petition before the trial court, Claber alleged that:

> "During all the times herein concerned, plaintiff has had in effect a system of pricing its 'Rubbermaid' products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance."

Prior to denying Rubbermaid any injunctive relief, the trial court in its opinion of March 5, 1965 (Appendix 26a) found that Rubbermaid sold direct to certain classes of retail dealers which included its largest Ohio retailer, but excluded Claber, although it met other criteria, at advantageous prices, and allowed them concessions by way of demonstrator allowances and advertising allowances which were not available to non-direct purchasing retailers. Although finding these allegations to be true, the trial court nevertheless found the demonstrator allowances not to be deliberately discriminatory nor intentionally harmful to defendant. In so doing, the trial court overlooked the provisions of the Robinson-Patman Act, 15

U. S. C. 13(a), (d), (e), (f). In *Federal Trade Commission v. Fred Meyer, Inc.*, __ S. Ct. __, 36 LW 4233, this court unequivocally held that a supplier may make a payment to retailer for services and allowances *only* if such payments are made available to all competing retailers handling the supplier's products. Claber's allegation of such discriminatory violation as is recognized in *Fred Meyer* was ignored by the trial court and is of extremely vital concern to all retailers. Such a violation if found by the trial court would have been a sufficient bar to injunctive relief against Claber.

CONCLUSION.

Appellant submits that the questions submitted by this appeal are substantial and that they are of vital public importance. We believe that the Supreme Court of Ohio's decision is not consistent with the previous pronouncement of this Court and other authorities.

Respectfully submitted,

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APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(May 24, 1965.)

This cause came on for trial before the Court and was heard upon the pleadings, the evidence, and the arguments of counsel.

Upon consideration, the Court finds, as prayed in the amended petition, upon the whole record, and subject to the conditions herein set forth, the plaintiff is entitled to injunctive relief.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

1. That the defendant, its officers, directors, servants, agents, associates, employees, sales force and any and all persons while acting under or in aid of the defendant are hereby permanently enjoined from selling, offering for sale or advertising for sale any products manufactured by plaintiff and bearing plaintiff's trademarks, brands, names or labels, including without limitation the trademarks "Rubbermaid," "Means Better Made," "Safti-Grip," and "Shelf Cushion" at prices less than the minimum retail resale prices now or hereafter established by plaintiff pursuant to its fair trade contracts in the state of Ohio; provided, however, it is a condition to the continued effectiveness of this order that with respect to any revision or change hereafter made in the price of any Rubbermaid fair traded product, whether made in connection with a special sale or otherwise, plaintiff shall have given direct written notice thereof to each Ohio retailer who has executed a Rubbermaid Authorized Fair Trade Agreement.

2. So long as plaintiff continues to sell under any of its trademarks as a non-fair trade item its bathtub mat

Item 0450, or any non-fair traded item similar thereto, there shall be excepted from the operation of the within injunction the plaintiff's Safti-Grip Bathtub Mat, Item DO-7038.

3. This injunction shall become effective thirty (30) days from the date of this Journal Entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

4. Plaintiff shall recover from defendant its costs incurred herein, for which judgment is rendered; but plaintiff's attorneys fees shall not be taxed as part of the costs.

Plaintiff and defendant except.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(June 22, 1965.)

This matter came on before the Court upon the application of the plaintiff for a postponement in the effective date of the injunction issued by this Court to become effective thirty (30) days after May 24, 1965, the date of the Journal Entry. In said Journal Entry the third paragraph provided as follows:

> 3. This injunction shall become effective thirty (30) days from the date of this Journal Entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on

Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

This Court is informed and finds that the plaintiff, on May 25, 1965, filed a petition in this Court "against the May Company seeking an injunction against the practice of the May Company of giving double stamps on cash sales of Rubbermaid's fair-traded products on Tuesday."

The Court is further informed and finds that the defendant May Company thereafter remove said action to the United States District Court for the Northern District of Ohio; and that said action is set for trial on the merits on July 12, 1965, before the Honorable James C. Connell, Chief Judge.

Upon the foregoing findings and for good cause shown plaintiff's application for postponement of the effective date of this Court's injunction is granted.

IT IS ORDERED that said injunction, as provided for in the Journal Entry of May 24, 1965, shall become effective July 30, 1965, unless at a hearing to be held, if necessary, on July 26, 1965, the defendant Claber-Distributing Company of Cleveland, Inc., establishes that, with plaintiff's consent or acquiescence, the practice of the May Company at any of its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products has not ceased.

Except to the extent that the present Journal Entry modifies the effective date of the injunction provided for in the Journal Entry of May 24, 1965, said previous Journal Entry is otherwise reaffirmed and continued in effect.

IT IS SO ORDERED.

SUPPLEMENTAL JOURNAL ENTRY OF THE COURT OF COMMON PLEAS.

(July 29, 1965.)

This matter came on for hearing on July 22nd, 1965 pursuant to paragraph three of this Court's Journal Entry of May 24th, 1965, as amended June 22nd, 1965, and upon the plaintiff's motion to cancel the conditions contained in said paragraph three and to make the injunction absolute and effective, and upon the evidence and arguments of counsel.

The Court finds and determines that plaintiff having requested that the Court file separate findings of fact and conclusions of law, the Court's written opinions of March 5th, 1965 and May 12th, 1965, and its oral opinion of July 22nd, 1965, constitute its findings of fact and conclusions of law.

And the Court further finds and determines that as of July 22nd, 1965, the practice of The May Company at its stores in Cuyahoga County, of giving double Eagle Stamps on Tuesdays on the cash purchases of Rubbermaid fair-traded products continues with plaintiff's consent and acquiescence.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The findings of fact and conclusions of law contained in the aforementioned opinions are reaffirmed; and said opinions shall be filed as the Court's findings of fact and conclusions of law.

2. Plaintiff's motion, described above, is denied.

3. The injunction referred to in the Court's Journal Entry of May 24, 1965 shall not become effective and is cancelled and denied.

4. Each party shall pay its own costs.

5. Full right of appeal is granted to both parties. Plaintiff and defendant except.

OPINION OF THE COURT OF COMMON PLEAS.

(March 5, 1965.)

WILLIAM K. THOMAS, J.:

Plaintiff, Rubbermaid, Incorporated of Wooster, Ohio, seeks a permanent injunction and damages against Claber Distributing Co. of Cleveland, Ohio, Inc., which owns and operates seven Uncle Bill's stores, all located in Cuyahoga County. Hereafter the plaintiff is called Rubbermaid, and the defendant is called Uncle Bill's.

Trade-marked "RUBBERMAID," rubber, wire, and plastic houseware products are manufactured by the plaintiff. Extensively advertised under the trade name "RUBBERMAID" these housewares are sold and distributed in Ohio and throughout the United States. Rubbermaid's houseware products, with a few exceptions, bear minimum retail prices which Rubbermaid stipulates and notices under the 1959 Ohio Fair Trade Act, R. C. 1333.27-34.

Uncle Bill's characterizes its seven retail stores as discount department stores. Uncle Bill's admits actual notice of Rubbermaid's fair trade agreements with Ohio retailers of Rubbermaid's houseware products; and Rubbermaid's establishment of minimum retail resale prices for certain of these products. Uncle Bill's further admits that it has acquired and subsequently offered for sale and sold certain Rubbermaid houseware products at prices below the minimum retail resale prices designated by Rubbermaid. It is Uncle Bill's continued sale of Rubbermaid's housewares below fair-traded prices which Rubbermaid seeks to permanently enjoin. By agreement plaintiff's

claim for damages is reserved for hearing after the Court rules on the request for injunctive relief.

Uncle Bill's challenges the constitutionality of the 1959 Fair Trade Act, and asserts certain affirmative defenses.

At the conclusion of plaintiff counsel's opening statement, defendant's counsel, renewing a ground first raised by demurrer, moved for judgment. He concedes that the 1959 Fair Trade Act was declared constitutional by the Cuyahoga County Court of Appeals in *Hudson Distributors, Inc. v. Upjohn Co.*, 117 Ohio App. 207. But he points out that the affirmance of *Hudson* by the Ohio Supreme Court (174 Ohio St. 487) was by a 3 to 4 vote. Section 2 of Article IV of the Ohio Constitution says that—

> No law shall be held unconstitutional * * * without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void.

Moreover he argues that *Hudson's* subsequent affirmance by the United States Supreme Court, 377 U. S. 386, 12 L. Ed. 2d 419, 84 Sup. Ct. 1561, merely determined that the Federal McGuire Act exempted the 1959 Ohio Fair Trade Act from the Federal Anti-Trust laws. In short, he argues that *Hudson* is only the law of that case.

Determining that *Hudson*, a decision of the Cuyahoga County Court of Appeals, is clearly binding on this Court the motion was overruled. That ruling is reaffirmed.

As related to the elements which plaintiff must prove to warrant injunctive relief under the 1959 Fair Trade Act the evidence supports and directs the following findings.

Rubbermaid manufactures principally a housewares line of products, though it also makes commercial and industrial type products such as rubber and vinyl throw mats for automobiles. Typical housewares for the kitchen

are drainboard mats, dishpans, dish drainers; for the bathroom typical items are bathtub mats, and toilet top trays; and for general house use there are wastebaskets, storage bins and cabinets, and floor mats. Rubbermaid's entire line of houseware items numbers about 100. In addition many of these items are produced in different colors. As a manufacturer the plaintiff is a "producer" under R. C. 1333.28.

Quality Housewares is the caption of its 1965 Catalog-Price List. Voiced most positively by defendant's Vice-President, the evidence reveals that plaintiff's products fully measure up to the quality claim. Registered as separate trade-marks with the U. S. Patent Office are a red panel shape, the included name "Rubbermaid" and the words "Means Better Made," which usually appear in the red panel immediately below the name "Rubbermaid." Patented with the U. S. Patent Office under Patent No. 191,901 are "Safti-Grip" bathtub and shower mats. The plaintiff qualifies under R. C. 1333.28 as a "proprietor," "who identifies a commodity produced by him by the use of his trade-mark."

Throughout the country there are a number of companies which manufacture rubber, plastic, and wire houseware products of the same type and class as plaintiff's houseware products. A list of 21 major competitors of Rubbermaid houseware products is in evidence. It is determined that, as required by R. C. 1333.29, Rubbermaid houseware products are "in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area."

It has long been Rubbermaid's policy to fair trade its houseware products. In states permitting fair trade minimum resale prices, executed agreements with retailers

who handle Rubbermaid products are required. This was true in Ohio under the 1936 Fair Trade Act declared unconstitutional in *Union Carbide & Carbon Co. v. Bargain Fair, Inc.*, 167 Ohio St. 182 (1958). In 1962, since the passage of the new Act in 1959, new agreements have been prepared by Rubbermaid. Over 1100 retailers in Ohio have signed these, and in Cuyahoga County some 150 retailers have entered Rubbermaid written agreements. The "Rubbermaid Authorized Retailer Fair Trade Agreement," in part, provides:

> 2. Rubbermaid products now or hereafter made subject to this agreement are and will be distributed under Rubbermaid's trademark, brand or name in free and open competition with commodities of the same general class produced or distributed by others.
>
> 3. Retailer agrees (except as specifically permitted by statute) not to advertise, offer for sale, or sell the products listed in Schedule A hereto attached or in said Schedule A as it may from time to time be amended at less than the minimum retail selling price stipulated on such Schedule for such a sale.

Uncle Bill's declines to sign an agreement with Rubbermaid. But it acknowledges receipt of written notices of Rubbermaid's fair trade agreements "establishing minimum Fair Trade retail prices on all 'Rubbermaid' trademarked housewares advertised or sold in Ohio."

Defendant Uncle Bill's has sold and is selling fair traded Rubbermaid Housewares below the stipulated minimum retail selling price. Experiencing difficulty in obtaining sources of supply, it frankly states it would sell more Rubbermaid products if available. It clearly regards Rubbermaid Housewares as quality merchandise that it desires to sell. Unless enjoined it is manifest that Uncle Bill's will continue to sell fair traded Rubbermaid Housewares below minimum resale retail prices.

The next essential element of the plaintiff's case arises under the proviso supplied by the second sentence of R. C. 1333.29. It reads:

> Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory.

Does the evidence show that Rubbermaid's minimum resale prices, differentiated as to various levels of distribution, are not otherwise unlawfully discriminatory? The language of the proviso must first be interpreted.

This proviso can hardly refer to any particular statutory prohibition against discriminatory prices. The Valentine Act (Anti-Trust) (R. C. 1331.01-99) is not applicable, nor is there any other Ohio statute which is. Moreover the Federal Robinson-Patman Act, 15 U. S. C. 13a, even if otherwise applicable, may only be enforced by one of its specified and self-contained remedies, *Bruce's Juices v. American Can Co.*, 330 U. S. 743; *Carter Products, Inc. v. Riteprice Merchandise, Inc.*, 23 Misc. 2d (N. Y.) 230.

This proviso is construed to mean that within (as distinguished from between) each level of distribution of the proprietor's products (i.e., retailer or wholesaler) the minimum resale prices must not be unlawfully discriminatory. Stated affirmatively, it is discriminatory minimum resale prices within the same level of distribution which is unlawful. There is no evidence that Rubbermaid is setting different minimum retail resale prices for different retailers. Nor is it claimed that this is happening.

R. C. 1333.32(B) provides:

> (B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> * * *

> (2) Obtain injunctive relief whether or not specific monetary damages are established; * * *.

Under this language no proof of monetary damages is necessary to establish irreparable injury, as a prerequisite to injunctive relief. Moreover by earlier language of R. C. 1333.32 it is an act of unfair competition for a distributor with notice of fair traded prices to sell below those prices. Non-compliance with the stipulated minimum retail resale prices irreparably injures the proprietor's minimum resale price maintenance program. Under the Act this is sufficient proof of irreparable injury.

The essentials of its case being satisfied, plaintiff establishes its right to permanent injunctive relief, unless the defendant has proved an affirmative defense which defeats plaintiff's right to relief. "While the Fair Trade Act does not make provision therefor, the Courts have engrafted equitable defenses on the right of manufacturers to enforce the Fair Trade Act," *The Lionel Corporation v. Phil Klein* (Delaware Court of Chancery), 114 A. 2d 652.

Considering defendant's affirmative defenses in the order in which they appear, the defendant first claims:

> *, * * plaintiff has failed to enforce diligently or fairly its alleged agreements, written, or otherwise, with its distributors or other retailers, as to minimum resale prices.

The evidence indicates that with the exception of Uncle Bill's, and the Ontario Stores (like Uncle Bill's, a subsidiary of Cook Coffee Company), other retailers in Ohio are complying with Rubbermaid's minimum retail resale prices. The evidence concerning Ontario Stores is incomplete. From the evidence in the record it appears that Ontario Stores is a discount merchandiser comparable to Uncle Bill's, with stores in Cincinnati, Columbus, and

perhaps elsewhere in Ohio. Legal efforts to enjoin Ontario Stores from selling below fair trade prices have failed in Columbus, *Bulova Watch Co. v. Ontario Stores*, 86 Ohio L. Abs. 585, 18 Ohio Ops. 2d 221, and apparently, recently, also in Cincinnati.

Any refusal of courts in Franklin County and Hamilton County to enjoin Ontario Stores from selling Rubbermaid products below fair trade prices does not prove Rubbermaid is less than diligent in pursuing legal remedies to enforce its established program of minimum retail resale prices. What it does prove is lack of statewide uniformity in judicial determination of the constitutionality of the 1959 Fair Trade Act due primarily to Section 2 of Article IV of the Ohio Constitution (language, *supra*).

Further charging lack of diligent enforcement of its minimum price maintenance program the defendant claims that Rubbermaid is acquiescing in the practice of The May Company, a direct retailer of Rubbermaid, in giving Double Eagle Stamps on each Tuesday. This practice, it is said, grants a price concession greater than the three percent limitation of R. C. 1333.32.

Plaintiff admits knowledge of the practice but insists that the practice does not violate R. C. 1333.32.

The May Company gives Eagle Stamps with the purchase of merchandise at its stores in Cuyahoga County. One Eagle Stamp is given for each ten cents of the purchase price (before taxes), figured to the lower even dime. Stamps are given on credit purchases conditioned on payment being made by the customer within fifteen days after the date of mailing the customer's statement. By inference, cash purchases on days other than Tuesday likewise entitle the purchaser to Eagle Stamps on the same basis.

On Tuesdays only, when a purchase is made and paid

for in cash (including check) at the time of purchase, two Eagle Stamps are given on each ten cents of purchase price computed as above stipulated. If the purchase on Tuesday is for credit, one stamp only is given upon payment within fifteen days, as in the case of all types of purchases on days other than Tuesdays.

To be redeemable all Eagle Stamps must be pasted in a stamp book provided by the Company. A full book consists of 1380 stamps, having a coupon value of $3.00. On the basis of a $3.00 coupon representing $138 in purchased merchandise the discount may be computed at 2.17 percent. A book filled with double stamps represents a discount of 4.34 percent.

These computations roughly conform to refund deductions. On merchandise returned for refund without the stamps when stamps have been given at the rate of one stamp for each ten-cent purchase, The May Company deducts two and one-half percent of the purchase price from the amount to be refunded. But where two stamps have been given for each ten cents of the purchase price on Tuesdays, on return of the merchandise without the stamps five percent is deducted from the purchase price.

Assuming that R. C. 1333.32 applies to Double Stamps on Tuesdays these stamps are identical to single stamps in character as well as value. Therefore whenever May Company gives Double Eagle Stamps on a fair-traded Rubbermaid Housewares product the purchaser is receiving a price concession in excess of the maximum three percent allowed by R. C. 1333.32. This assumption the plaintiff vigorously disputes.

Plaintiff urges that the second stamp is different from the first. It contends that the first stamp is a credit transaction stamp; and this is authorized by R. C. 1333.32. It

argues that the second stamp, given on cash purchases on Tuesday, is a cash discount not subject to any limitation of R. C. 1333.32. Rubbermaid's Fair Trade Agreement authorizes the second stamp, it is said, in these terms:

> Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three percent (3%) of the minimum retail selling price only under the following terms and conditions:
>
> 1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.

In actual fact The May Company does not distinguish the first from the second of the double stamps. Thus the single stamp is not given only in credit transactions. On days other than Tuesdays the so-called single stamp is given for cash purchases, as well as on credit purchases. Moreover the May Company advertising always refers to DOUBLE EAGLE STAMPS ON TUESDAY. It never differentiates the second Tuesday stamp. Also only one type of stamp redemption book is provided. In this book are pasted, indiscriminately, second stamps as well as single stamps. Everything considered the single stamp, among other things a discount for prompt payment of bills, is held to be a price concession or cash discount. So is the second of the double stamps.

Examination of R. C. 1333.32 makes it evident that Rubbermaid and The May Company cannot by private agreement create a trading stamp that is immune from R. C. 1333.32. By its plain terms, R. C. 1333.32 embraces all price concessions, and trading stamps. It specifies that in determining whether the sale of a commodity is below the proprietor's stipulated minimum resale price "any concession made, whether by the giving of coupons or otherwise" shall be deducted from the price. Only the

succeeding proviso legalizes trading stamps. R. C. 1333.32's proviso permits:

> * * * the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three percent of such stipulated minimum resale price, * * *.

This proviso embraces all trading stamps, irrespective of their purpose. It leaves no room for any type of price concession stamp to operate outside of its three percent limitation. Old as is the May Company's sixty-year practice of giving Double Eagle Stamps on Tuesdays its venerability does not put the custom beyond the reach of the plain and positive three percent trading stamp limitation of R. C. 1333.32.

Plaintiff's counsel suggest that it may be difficult to enforce an end to May's practice of giving Double Eagle Stamps on Tuesday on the cash purchase of Rubbermaid fair traded products. Nothing in the record suggests that The May Company will not conform to the three percent trading stamp limitation, now that its applicability to Double Eagle Stamps on Tuesday has been judicially determined. The evidence does reveal that Rubbermaid has a built-in enforcement means at its disposal. Presumably, Rubbermaid's control over its retail representatives at May's is sufficient to enforce the ban against Double Eagle Stamps on Tuesday. Rubbermaid's retail representatives, who principally sell Rubbermaid's products, can themselves refuse to give the extra stamps. Other means of enforcement as well are at Rubbermaid's disposal.

Defendant proves Rubbermaid's lack of diligent enforcement of its minimum price maintenance program, in knowingly permitting May's Double Eagle Stamps on Tuesday to be given on Rubbermaid cash purchases.

As long as The May Company, a dominant retailer in Greater Cleveland and in the State, continues to violate the 1959 Fair Trade Act, with Rubbermaid's consent or acquiescence, the plaintiff is not entitled to the injuction it seeks against the defendant's breach of the same Act. To hold otherwise would offend Equity's most honored maxim, that he who seeks equity must do equity. The order hereafter constructed is accordingly designed.

In its next affirmative defense the defendant contends,

> that plaintiff has knowingly initiated, permitted and acquiesced in special sales at substantially reduced prices, discounts, allowances and concessions by others in the retail sale of "Rubbermaid" products.

R. C. 1333.29 authorizes price changes in these words—

> Such prices may be changed from time to time by written notice to distributors who acquired such commodity with notice of any established minimum resale price.

The plaintiff announces its permanent price revisions in several ways. The basic list of stipulated prices is Schedule A of the Rubbermaid Fair Trade Agreement. A revised Schedule A is mailed annually to each Rubbermaid retail dealer effective January 2nd. Also sent to all retail dealers and to its other accounts is the attractively colored and illustrated Catalog-Price List issued annually. This publication includes Company item number, picture, and description of each item, together with the current revised price list. An up-to-date price list is also separately published twice a year. Both the Catalog-Price List and the Price List state that prices are subject to change and that the listed products are fair traded in states having Fair-Trade statutes in effect.

During the course of the year Catalog Supplements are issued and distributed. Expressly amending revised Schedule A the Supplements list any new products, price reductions and discontinued items. Though not explained in the Supplements, the evidence developed that discontinued items are freed from stipulated price restrictions. To aid in merchandising discontinued items the retailer may sell these items at any price. A marketing necessity, this departure from minimum resale price maintainence illustrates that absolute price fixing is a merchandising impossibility. Nevertheless it shows no intent to abandon the fair trade program.

It is the special or promotional sales, conducted once or twice a year, which defendant claims represents an abandonment of plaintiff's fair trade price program.

With approximately four items involved in the sales, the number of sales items, in and of itself, is not a substantial part of the approximately 100 fair traded Rubbermaid Houseware products. In addition, the limitation of the price reduction to a fixed and limited period of sixty days evidences an intent to maintain and only to temporarily reduce the stipulated minimum resale prices.

Defendant's objection if correctly understood, goes to the size of the price reductions, and to the announcement of comparative old and new prices to gain maximum consumer attention and acceptance. Thus in the 1964 Fall Sale one Rubbermaid promotional flyer declared "Rubbermaid Dishpans $1.57 Regularly $1.98—Priced to Build Traffic at Full Profit." Another brochure proclaimed "Retails Reduced Up to 25% on Aluminum Top Counter Mats." A bulletin to all Rubbermaid Houseware Salesmen in July 1964 added Wastebaskets as a fall special. News of the one-third reduction in retail prices climaxes the sales appeal,

We're a sneaky bunch at Rubbermaid * * * I'd like to tell you about a 'Housewares Show Special' we're unveiling * * * to the amazement of our friends and customers (and the consternation of our enemies and competitors).

We've taken the four top selling Rubbermaid Rectangular Wastebaskets

* * * picked the fastest selling colors

* * * packed the entire assortment in *one* shipping carton

* * * picked the peak fall selling period

* * * REDUCED RETAIL PRICES BY ONE-THIRD.

The evidence reveals that the promotional sale price reductions and for that matter all other price reductions are brought to the customer's attention through various marketing techniques. Specially printed stickers attached to the container declare 1/3 OFF—Reg. Price $1.49—Now 99¢. A Safti-Grip Bathtub Mat Box bearing the printed price of $3.98 carries a sticker—PRICE REDUCED—NOW $3.49. Where stickers are not available a line may be drawn through the old price with the new price written in below, to emphasize comparison prices. Reported were numerous instances of Rubbermaid products on display in Cleveland's large department stores with markdowns of this type.

Department Store newspaper and direct mail advertisements of the 1964 Fall Sale specials further illustrate the same deliberate appeal to the bargain hunting consumer. One ad stated—1/3 OFF RUBBERMAID SPECIALTIES. The products featured were Wastebaskets and Storage Turn-Tables. A direct-mail booklet among many products of different manufacturers included Rubbermaid aluminum—top stove and counter mats—25% off.

One of plaintiff's witnesses was asked about a drain board mat, on which the printed price of $1.50 was scratched and $1.29 written thereunder. He answered,

> Since the purpose of reduction in the retail price is to make it available to the consumer at the new retail price, we welcome anything that can be done to tell the consumer * * * that she can now buy it at the new retail price of $1.29.

Asked whether by seasonal promotions it was hoped to improve consumer acceptance of Rubbermaid products he answered,

> This is only one of the purposes or reasons * * *. It is general practice in the business, in the trade, to have seasonal promotions and as one of the major manufacturers of housewares we are of course expected by our customers to also have seasonal promotions.

This sampling of the evidence shows; and it is found, that the comparative pricing marketing policy and practice of Rubbermaid is designed and serves to whet customer demand and retailer enthusiasm. It helps Rubbermaid and its retailers meet the competition of manufacturers of comparable brand name products. It fosters plaintiff's "free and open competition with commodities of the same general class produced by others."

Defendant's main point in this affirmative defense will be paraphrased. One of the legislative purposes of the fair trade law is to safeguard the good will attached to the proprietary interest in trade-marked products. If Uncle Bill's price reductions of trade-marked fair traded products is said to adversely affect Rubbermaid's good will, defendant argues that Rubbermaid's special sales at substantially reduced prices, and Rubbermaid's comparative pricing policy and practice similarly adversely affect Rub-

bermaid's good will. By this adverse effect, it is claimed Rubbermaid's Special Sales and comparative pricing work an abandonment of its minimum retail resale price maintenance.

When able to buy Rubbermaid's products from a wholesaler Uncle Bill's purchase price is forty percent off list (the same as retail hardware and houseware dealers). It sells Rubbermaid products approximately one-third off list (minimum retail resale price). On the average it reports its mark-up is 22 to 25 percent above cost; and that this reduced mark-up is made possible by self service merchandising and other low overhead expense. Actually it appears that Uncle Bill's is selling Rubbermaid products at only ten percent above its cost. For one-third off list is 66¢ on a dollar item. The selling price of 66¢ is but ten percent above its 60¢ cost (forty percent off one dollar list).

Selling Rubbermaid products at a mark-up of only ten percent, substantially below its average 22 to 25 percent mark-up, justifies the finding, now made, that Uncle Bill's is pricing Rubbermaid's quality products to attract customers. This pricing may be termed a reduced-price-leader. Yet it is not the fair-trade item loss leader tactic attributed to discount stores by the *Hudson* finding (174 Ohio St., at page 494).

> When * * * the discounter uses fair-trade items as a come-on, selling items at cost or even at a loss to entice customers into his store * * *.

Comparable to defendant's regular one-third reductions plaintiff's 1964 fall specials had price reductions varying from a minimum of 21% to a maximum of 37%. Wastebaskets were reduced one-third, and Storage Turn-Tables 37%. Drainboard Mats, Stove 'n Counter Mats, and Dishpan mark-downs ranged between 21% and 25%.

Plaintiff's witnesses insist that if Rubbermaid institutes the price changes, if the price changes are made in the context of frequency and items involved, and if the price changes are available to all retailers Rubbermaid's good will is not adversely affected. However they insist that any unilateral price change by a single Rubbermaid dealer alone adversely affects good will.

The weight to be given this evidence depends on whose good will is in question. The good will of the retail dealers of Rubbermaid products is undoubtedly furthered by the maintenance of minimum retail resale prices. Likewise when a price reduction in stipulated prices is sponsored by Rubbermaid and made available to all retail dealers their good will for Rubbermaid is fostered. Conversely when a single retailer succeeds in selling Rubbermaid fair trade products below stipulated prices Rubbermaid good will in the minds of Rubbermaid retailers is damaged and impaired.

R. C. 1333.31 of the Fair Trade Act grants a proprietor a retention of a proprietary interest in his trademarked products, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

Hudson makes it plain that the good will which the Act seeks to protect is consumer good will (demand). Thus it finds (174 Ohio St., at page 495):

> The majority of present-day consumer purchasing is by brand name. Today the public demand necessary for retail selling is created to a great extent not by the retailer but by the manufacturer, the owner of the trademark * * *. The value of any trademark is, of course, the demand for the product which it represents * * *.

As far as consumer good will (demand) is concerned, the plaintiff spends a great deal each year to maintain this. Of its 1964 estimated advertising expenditures $36,000 went to trade advertising while $512,600 went to consumer advertising; and of the $888,820 estimated as Rubbermaid's 1964 sales promotion expenditures, $448,500 was for co-op merchandising allowances (department store advertising reimbursement).

However, there is nothing in this record which supports the factual assumption of *Hudson* (174 Ohio St., at page 495):

> The continued discount selling of a trade-marked product eventually cheapens it in the eyes of the purchasing public. If such product is sold at a reduced price the public will eventually get the idea that the product is cheap and turn to others, seeking higher quality merchandise.

There is nothing to indicate that Uncle Bill's sale of Rubbermaid products at one-third off list price has cheapened Rubbermaid in the eyes of the purchasing public. On the contrary it is quite clear in the record that the Rubbermaid trade-mark and trade name remain synonymous with quality. Human nature, being what it is, a consumer wants Rubbermaid quality at the lowest price. Illustratively, a Rubbermaid witness was asked, "When people learn prices are reduced would that affect good will?" He honestly answered, "* * * when we generally reduce a price, we hope the consumer will say, 'Gee, that's wonderful, now I can afford this item, maybe.' "

Upon the evidence it is determined that consumer good will (demand) for Rubbermaid products is not impaired by reductions below previous fair-traded prices. Accordingly it is found that consumer good will for Rubbermaid is not adversely affected or disadvantaged by

price reductions on Rubbermaid's fair trade products, whether Rubbermaid or Uncle Bill's reduces the prices. Consumer good will not being harmed thereby plaintiff's price policies and practices cannot and do not abandon its minimum price maintenance.

The authority under R. C. 1333.29 to change stipulated minimum resale prices "from time to time" is broad enough to include the right to set temporary minimum resale prices during special sales. The statute however requires that the change be accomplished by "written notice" to the proprietor's distributors. What does "written notice" mean?

Section 1333.28(J) of the Revised Code defines notice as actual notice by any method provided by R. C. 1333.30. Actual notice however must be "written notice." It therefore cannot be oral, and it cannot be by advertising. The proprietor may give the notice of price changes by mail to each distributor. Or if the price change is clearly marked on the merchandise the statute specifies that this "shall be conclusive evidence of actual notice of such minimum resale prices."

Judge Griffith in *Hudson Distributors v. Upjohn Co., supra* (174 Ohio St. 487), at page 496 says,

> Here we have the producer of a commodity * * * fixing the price only of his own commodity.

This is nonetheless a unilateral power, even if by contract, express or implied, the distributor has assented to the proprietor's right to fix prices. As Judge Leach said in *Bulova Watch Co. v. Ontario Stores, supra,*

> * * * the question of whether minimum resale prices shall be established, whether, if established, they shall continue, the amount of such prices and the changing of such amount from time to time are all delegated to private persons to be exercised in their uncontrolled

discretion without any legislative standards or criteria.

Indispensable to the exercise of a power of this magnitude, whether it involves stipulating prices originally, or in making later price changes, written notice of any price change must be given equally and without discrimination to all distributors.

Applying these conclusions R. C. 1333.29 is construed to require Rubbermaid, in writing, to directly notify all its retail distributors in the same manner and at the same time. Actual written notice has been directly given to Rubbermaid wholesalers and all of its direct retail customers. With the use of flyers distributed by its wholesalers notice of price changes in special sales have been given its retail hardware and houseware dealers. There is no evidence that any retail dealer failed to get notice of the special sale price changes.

In this state of the record prior non-compliance with "written notice" of special sale price changes, insofar as the retail hardware and houseware dealers are concerned, cannot prevent plaintiff's request for injunctive relief. Nevertheless prospective operation of the order hereafter issued will be conditioned upon future notice of price changes being given to all retailers, directly and in writing.

The defendant further claims that the plaintiff has abandoned its price maintenance program through the manufacture and sale of "a bath mat which does not have a minimum stipulated resale price but which is identical in all respects with one which has, except only the imprint of the Rubbermaid name on the product." The plaintiff rightly insists that there is no compulsion to fair trade all of its houseware products. It insists further that the mat's difference in quality explains the lower price of the non-fair traded bathtub mat.

Since evidence in support of this claim has been received without objection, and the point has been fully argued, it will be ruled on, even though there is no affirmative defense which clearly covers this claim.

The bathtub mats in question are the fair traded Item No. DO 7038, and the non-fair traded Item No. DO 0450.

Both mats are 14 inches by 22½ inches in size. Both mats bear imprints of U. S. Patent No. 191,901. To the untrained eye there is no great difference in the quality of the rubber in each; but Item No. 7038 does have many more suction cups than Item No. 0450. By actual count Item No. 0450 has 288, while Item No. 7038, by estimate, has 526.

Item No. 7038, the fair-traded bathtub mat is packaged in a box labeled Rubbermaid Safti-Grip Bathtub mat, and bears the Rubbermaid trade-mark imprinted on the mat. Item No. 0450, the non fair-traded bathtub mat which sells for 80¢ less, is packaged in cellophane. Inside is a visible litho label, which at the top reads Safti-Grip Bathtub Mat; and the label at the bottom bears the Rubbermaid trade-mark.

Upon this evidence it is determined that a consumer may confuse non-fair-traded Item No. 0450, a Safti-Grip Bathtub Mat, with the same sized Safti-Grip Item No. 7038, a fair-traded bathtub mat. Admittedly Item No. 0450 is a promotional item. A cheaper bathtub mat, it may easily be mistaken by the consumer for the Safti-Grip Bathtub Mat, Item No. 7038, which apparently is of better quality. Neither packaging nor labeling informs the consumer which item is fair traded, and which is not fair traded.

Insofar as Item No. 7038 is concerned, as in *Krupsaw v. Luskin*, 1956 Trade Cases 68,288, "* * * the public is permitted to believe, albeit erroneously, that it can buy

the same kind of articles at substantially lower prices." It is therefore determined that the manufacturing and sale of Item No. 0450 effects an abandonment of the minimum resale price on Item No. 7038.

The claim of the defendant being sustained as to Safti-Grip Bathtub Mat, Item No. DO 7038, this particular item will be excepted from the effect and application of the injunctive order hereafter issued.

Finally to be considered is the affirmative defense which defendant designates Fourth Defense. It reads—

> During all times herein concerned, plaintiff has had in effect a system of pricing its "Rubbermaid" products for sale to retailers whereby certain retailers and classes of retailers have received discriminatory advantages by way of additional discounts, demonstrator allowances and advertising allowances; said practice by the plaintiff being entirely inconsistent and in conflict with its alleged program of resale price maintenance.

Previously no unlawful discrimination was found to exist in minimum resale prices at the various levels of distribution. The present claim is something else. Here it is claimed discriminatory price discounts by way of demonstrator and advertising allowances favor certain retailers and classes of retailers.

For each class or level of distributor this is the Rubbermaid price structure. The wholesalers purchase from Rubbermaid rubber and wire houseware products at list (minimum retail resale prices) less 50% and 4%; and plastic houseware products at list less 50% and 10%. (Whenever two percentages are combined the second is a percentage of the first.) Rubbermaid's agreements with its wholesalers stipulate minimum resale prices to the retail hardware and houseware dealers at list price less 40%.

Rubbermaid sells direct to several classes of retail dealers. It sells direct to variety chains at 40% and 5% off list; and to premium accounts (said to approximate wholesalers but not otherwise described in the evidence) at 50% and 6% off list.

Rubbermaid also sells direct to department stores. Asked what is meant by the term department store it answers—we mean traditional department store. No more specific definition is suggested. Department stores buy from Rubbermaid at 40% and 5% off list. However if the department store contracts with Rubbermaid for its demonstrator program (now known as the retail representative program) and agrees to the terms and conditions of participation the department store buys from Rubbermaid at 40% off list (without the added 5% off).

Every $6,000 in Rubbermaid purchases during the preceding year qualifies a department store for a one-quarter demonstrator unit. At $12,000 in Rubbermaid purchases the department store would be eligible for a one-half unit; and so on. Thus at $24,000, a full unit would be available (one demonstrator) and at $30,000 one and one-quarter units would be available.

The wages of a demonstrator, varying between $50 and $57 a week, are either paid direct by Rubbermaid or if paid by the department store are reimbursed by Rubbermaid. A full time demonstrator is expected to devote all her time to Rubbermaid sales and promotions.

The dollar value of the demonstrator program is computable. Purchases from Rubbermaid of $24,000 represents $40,000 (list price) less 40% or $16,000. At $55 a week the demonstrator's annual salary of $2860 represents almost 18% of the $16,000. Hence 40% and 18% off list produces a lower price (and probably an increase in business) contrasted with the 40% and 5% off list price

at which the direct retail dealer (department store) buys who does not participate in the demonstrator program.

The demonstrator program, with its promotion and increased sale of Rubbermaid products, is advantageous to Rubbermaid. The participating department stores stock all or most of Rubbermaid's entire line of housewares. Their displays are extensive. Their customers represent a large and receptive consumer market. Adequate consideration existing for the demonstrator allowances, the allowances are determined not to be price cuts in disguise. Moreover the demonstrator allowances are held not to be deliberately discriminatory nor intentionally harmful to the defendant.

A similar conclusion is reached concerning the 3% cooperative merchandising allowance which reimburses department store advertising of Rubbermaid products for media expense actually incurred. Here too an obvious promotional advantage redounds to Rubbermaid. Payment for this consideration, undoubtedly valuable to Rubbermaid, fails to prove the defense claimed.

A related but different question is whether, as a prerequisite to granting of injunctive relief, this Court has the power and the duty to require the plaintiff to remove all financial preferences from its price structure. Should the plaintiff, in granting demonstrator and advertising allowances, be compelled to scuttle its vague department store classification and permit any retailer to participate when it reaches $6,000 (one-fourth demonstrator unit) in Rubbermaid purchases? Should the plaintiff be required to make the 3% co-op merchandinsing allowance (now available to department stores) also available to its wholesalers? Increase of the present 2% allowance by one percent could be used by the wholesalers to directly advertise Rubbermaid products for the wholesalers' hard-

ware and houseware retailers. This would clearly aid these small retailers more than the department store advertising of Rubbermaid products, from which plaintiff's witnesses insist the small retailer derives a vicarious benefit.

The only small retailer who appeared as a witness testified that customers, seeing his regular Rubbermaid prices, leave his hardware store without buying. Undoubtedly he attributes this to Uncle Bill's reduced price of Rubbermaid products, even though offers to prove this point were ruled inadmissible. Protection of the small retailer from discount retailing below fair trade prices is within the legislative purpose of the Act "to protect and preserve small business." To achieve the same legislative purpose may Equity require the proprietor to extend its pricing and allowance advantages equally to small and large retailers alike?

Everything considered, the power to balance the equities is deemed not broad enough to permit this Court to so regulate the plaintiff's manner of doing business.

Within the context of this case an equitable defense must relate to a proprietor's conduct which either violates the 1959 Fair Trade Act, or is inconsistent with the maintenance of plaintiff's minimum retail resale prices. Applying this test, the Fourth Defense, under the evidence, is not sustained.

The Fifth and Sixth Defenses have each been previously stricken as a matter of law.

Upon the whole record an injunction will be granted in favor of the plaintiff and against the defendant, to enjoin the defendant from selling, offering for sale or advertising for sale any product manufactured by plaintiff and bearing plaintiff's trade-marks, brands, names or labels, at prices less than the minimum retail resale prices now

or hereafter established by plaintiff pursuant to its fair trade agreements and contracts, but said injunction shall be conditioned upon the following terms:

1. The injunction shall become effective thirty days from the date of the Journal Entry, unless at a hearing to be held, if necessary, five days prior to the effective date the defendant establishes that the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesday on the cash purchases of Rubbermaid fair traded products has not ceased.

2. The plaintiff shall hereafter give direct written notice to each Ohio retailer of Rubbermaid fair traded products of any price revision or change, whether made in connection with a special sale or otherwise.

3. Excepted from this order is Safti-Grip Bathtub Mat, Item No. DO 7038.

4. The question of damages is reserved.

5. This order is subject to the further order of this Court.

WILLIAM K. THOMAS,
Judge.

OPINION OF THE COURT OF COMMON PLEAS.

(May 12, 1965.)

WILLIAM K. THOMAS, J.:

Defendant Claber Distributing Co. of Cleveland, Ohio, Inc. (Uncle Bill's), moves to dismiss plaintiff Rubbermaid, Inc.'s application for an order requiring Uncle Bill's to pay the attorney fees of Rubbermaid's counsel in this litigation.

In the March 5, 1965 decision of this court granting Rubbermaid a conditional injunction against Uncle Bill's sale of Rubbermaid's fair-traded products at prices less

than Rubbermaid's minimum retail resale prices, the question of damages was reserved. Subsequently a hearing was held to receive proof of any claimed damages. Rubbermaid relinquished its claim of damages, but made application for an order to require Uncle Bill's to pay Rubbermaid's attorney fees incurred in this litigation.

Rubbermaid's application for the payment of its attorney fees is made pursuant to Revised Code Sec. 1333.32 (B) which reads:

> Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:
>
> (1) Recover the amount of damages sustained as a result thereof;
>
> (2) Obtain injunctive relief whether or not specific monetary damages are established;
>
> (3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

In support of its motion to dismiss Rubbermaid's application Uncle Bill's urges that "the statute (Sec. 1333.32 (B) (3)) which undertakes to permit the inclusion of attorneys' fees as part of the court costs is unconstitutional in that it denies this defendant due process and equal protection of the law, and further (2) that even if the statute were valid attorneys' fees should not be allowed to the plaintiff in this case."

"The general rule in Ohio is that, in the absence of a statutory provision making attorney fees a part of the costs, such fees cannot be so taxed," *State ex rel. v. Morse*, 165 Ohio St. 599 at 607. In stating that "costs of suit (including reasonable attorney fees)" may be recovered, Re-

vised Code Sec. 1333.32 (B) (3), consistent with the general rule, provides that attorney fees may be taxed as part of the costs. The provision, however, authorizes reasonable attorney fees only in favor of a prevailing petitioner under the 1959 Ohio Fair Trade Act. It is on this one-sided quality of the Act that the defendant centers its constitutional attack. Mindful of the "judicial obligation to support the enactment of a law-making body if this can be done," 10 *O. Jur.* 2d 240, Constitutional Law, Sec. 162, the meaning and effect of Revised Code Sec. 1333.32 (B) (3) will be analyzed.

Revised Code Sec. 1333.32 (B) lists three possible items of recovery.

The first is damages.

The second is injunctive relief.

The third is costs of suit, including reasonable attorney fees.

The section states that "costs and attorney fees may be recovered whether or not specific monetary damages are established." However, court costs (including attorney fees) are not an independent item of relief. Court costs (including attorney fees) must be incidental to the recovery of monetary damages or injunctive relief or both. Yet if damages or injunctive relief are recovered it does not follow that court costs and attorney fees must be taxed.

In providing that "costs and attorney fees may be recovered," Revised Code Sec. 1333.32 (B) (3) manifests an intention to make discretionary the incidental taxing of costs and attorney fees. Wholly absent is mandatory language, such as appears in Revised Code Sec. 4123.51.9, under the Workmen's Compensation Act, which states, "The cost of any legal proceedings * * * including an attorney's fee to the claimant's attorney to be fixed by the trial judge in the event the claimant's right to participate * * * in the

fund is established * * * shall be taxed against the employer or the industrial commission." Fairly construed, Revised Code Sec. 1333.32 (B) (3) is deemed to vest the trial judge with discretion as to whether or not costs and attorney fees shall be recovered by a party who secures relief under the 1959 Fair Trade Act of Ohio (Revised Code Sec. 1333.27-1333.34).

In exercising judicial discretion as to whether or not court costs and attorney fees should be taxed, this cannot mean that the trial judge must award court costs and attorney fees to every party who secures relief under the Act. If that were so, the judge is not vested with judicial discretion.

What then is the criterion which should govern the exercise of judicial discretion in awarding costs and reasonable attorney fees. In equitable proceedings "the allowance and apportionment of costs has always rested in the sound discretion of the court," 14 *O. Jur.* 2d, p. 16, Costs, Sec. 16. Revised Code Sec. 2323.44 codifies this principle. This principle of sound discretion offers a general guide, but a more definite criterion is needed.

Elaboration of the guide of sound discretion in awarding attorney fees is available in the judicial construction of Title 35, U. S. C. A. Sec. 70. Prior to the 1952 revision it provided that "The Court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case." Concerning this language *Turchan v. Cincinnati Milling Machine Co.*, 208 F. 2d 229 (6th Circ. 1953) declares:

> It has been held that under this section such fees are not to be allowed as a matter of course for Congress did not intend recovery of attorney fees to become the usual thing in patent cases, that the section commits the matter to the discretion of the District Court, that

> the criterion for its exercise is bad faith of the unsuccessful party and the reviewing court will not interfere unless there has been an abuse of discretion amounting to caprice or an erroneous conception of law.

Talon, Inc. v. Union Slide Fastener, Inc., 266 F. 2d 731, points out that:

> Under 35 U. S. C. A. Sec. 285 'the court in exceptional cases may award reasonable attorney fees to the prevailing party.' This section enacted in 1952 adopted the language of the repealed 35 U. S. C. A. Sec. 70, except that the wording 'exceptional cases' was substituted for 'in its (the court's) discretion.' This change was explained by the revisors as merely expressing the intent of 35 U. S. C. A. Sec. 70, as shown by its legislative history and as interpreted by the courts.

The Court of Appeals for the Ninth Circuit further ruled:

> * * * Here the trial court's findings of fact that the action was brought by Talon without sufficient investigation, in bad faith, without reasonable belief in the validity of the patents, and that the litigation proves harassment and misconduct on the part of Talon, are all clearly supported by the record. We hold that the trial court did not abuse its discretion in awarding attorney's fees to Union.

Even in the absence of a statute permitting attorney fees in trademark infringement and unfair competitive cases, "the lower federal courts, as a part of their historic equity jurisdiction, grant attorneys' fees in such cases as compensatory damages and not as costs against a party guilty of fraud, bad faith, or other unconscionable conduct." Annotation, 8 L. Ed. 2d 894 at 914.

In determining whether or not attorney fees should be taxed in favor of a party who secures relief under the Ohio

Fair Trade Act the trial judge should exercise his sound discretion. In exercising his sound discretion the trial judge should appraise the conduct of the party against whom monetary damages or injunctive relief is recovered. If bad faith, by sham or vexatious defenses, or other unconscionable conduct, marks the actions of the party against whom relief is recovered, then reasonable attorney fees should be taxed against such party in favor of the prevailing party.

This construction of Revised Code Sec. 1333.32 (B) (3) differs from the categorical grant of attorney fees provided solely to claimant's attorneys in the statute struck down in *Coal Company v. Rosser*, 58 Ohio St. 12. Presently relevant is the Supreme Court's observation in *Rosser* that "Under these circumstances no intent to vex, or harass the claimant, or delay the action, can be imputed to the plaintiff in error."

Defendant urges invalidity of Revised Code Sec. 1333.32 (B) (3) on the ground that it denies due process and equal protection of the law. In *Gomes v. Bristol Manufacturing Corporation*, 184 A. 2d 787 (1962), the Rhode Island Supreme Court upheld the constitutionality of the provision of the Rhode Island Workmen's Compensation Act, which like the Ohio law, allows costs and reasonable attorney fees to be taxed against an unsuccessful employer, while not extending the same right to a successful employer against a losing employee. It held, "this is not an improper classification."

Litigation is the method prescribed by the Legislature to enforce the provision said to be the core of the 1959 Ohio Fair Trade Act. *Hudson Distributors v. Upjohn Co.*, 174 Ohio St. at 491 says:

> This provision is the core of the act. When read in conjunction with the rest of the act, it provides in

essence that, when a retailer with notice that an item had been fair-traded procures it for resale, he is deemed to have entered into an implied contract with the owner of the trademark that he will sell the item at the fair-trade price.

The Legislature may seek to facilitate the purposes and enforce the central provision of the Act by taxing reasonable attorney fees against defendants who are guilty of bad faith in resisting the litigation. Treating defendants differently from plaintiffs as well as from each other, depending on the good faith or bad faith of their conduct in resisting litigation is a reasonable classification.

Moreover, any reasonable attorney fees recovered under Revised Code Sec. 1333.32 (B) (3) would not represent a penalty. Instead they would be taxed as a form of costs within the definition of costs given in *Symons v. Eichelberger*, 110 Ohio St. 224, at 238:

> Costs are not at the present time considered as punishment. The modern theory is that costs are allowances authorized by statute to reimburse the successful party for expenses incurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court.

The foregoing conclusions of law will be applied to Uncle Bill's motion to dismiss Rubbermaid's application for reasonable attorney fees. In the exercise of sound discretion, this court must determine whether or not Uncle Bill's conduct in this litigation has been marked with good or bad faith.

Uncle Bill's throughout this litigation has urged the unconstitutionality of the 1959 Ohio Fair Trade Act. Bearing in mind that in *Hudson, supra*, four out of seven judges

of the Ohio Supreme Court held the Act was unconstitutional, it cannot be found that Uncle Bill's continuing challenge of the Act's constitutionality evidences bad faith.

Uncle Bill's has asserted several equitable defenses. Some of these have been overruled. Several have been sustained, and are reflected in the conditional nature of the injunction which the court has ordered. Thus the terms of the proposed order provide, in part:

> 1. The injunction shall become effective thirty days from the date of the Journal Entry, unless at a hearing to be held, if necessary, five days prior to the effective date the defendant establishes that the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesday on the cash purchases of Rubbermaid fair-traded products has not ceased.

These several defenses, asserted by Uncle Bill's, are neither sham nor vexatious, nor unconscionable. Uncle Bill's, through its attorneys, has fought hard but with good faith in opposing the Act and this litigation brought under the Act.

Absent a finding of bad faith in Uncle Bill's conduct in this litigation, plaintiff Rubbermaid's application for an order directing Uncle Bill's to pay its reasonable attorney fees is dismissed.

WILLIAM K. THOMAS,
Judge.

ORAL OPINION OF THE COURT OF COMMON PLEAS.

(July 22, 1965.)

WILLIAM K. THOMAS, J.

(34) The Court: Gentlemen, I want to say at the outset, as I listened, as I listened to counsel for Rubbermaid is presenting its application here asking the Court to alter certain original conclusions and findings, among other things, that I am certainly struck with your complete sincerity in these matters. I must, of course, bear that in mind and I must also bear in mind the issue that has now been before me since some several months ago on March 5 when I rendered my original opinion. On the 24th of May, 1965, I signed the journal entry in this case. Paragraph 3 of the journal entry reads as follows:

> "This injunction shall become effective thirty (30) days from the date of this journal entry unless at a hearing to be held, if necessary, within five days prior to such effective date, the defendant establishes that, with plaintiff's consent or acquiescence, the practice of The May Company, at any of its stores in Cuyahoga County, of giving Double Eagle Stamps on Tuesdays on the cash purchase of Rubbermaid fair-traded products has not ceased."

This finding and conclusion of the Court is, of course, predicated on the conclusions and findings contained in the Opinion of March 5 as it relates to the practice of The May Company which is described in the third paragraph of the journal entry of May 24.

On pages 9 and 10 of that Opinion I made (35) certain observations and findings concerning this practice and I concluded with this sentence:

> "Old as is The May Company's sixty-year practice of giving Double Eagle Stamps on Tuesday, its venerability does not put the custom beyond the reach of

the plain and positive three per cent trading stamp limitation of R. C. 1333.32."

I went on to say further:

"Defendant proves Rubbermaid's lack of diligent enforcement of its minimum price maintenance program, in knowingly permitting May's Double Eagle Stamps on Tuesday to be given on Rubbermaid cash purchases."

I have examined the record in front of me and I find no basis for altering my conclusions reached there. At this time I reaffirm the conclusions stated in my Opinion and the finding contained in paragraph 3 of the journal entry of May 24 as to the substantive question.

We move now then to the procedural aspects of this proceeding. On that very same day, May 24, we had a hearing with counsel present, and, among other things, the question of burden of proof in this subsequent hearing arose. At that time the following statements were made in part by the Court:

"I have further said that in the event of a further hearing in this case with reference to the matters covered by paragraph 3 of the journal entry, that I will assume that those matters I have previously found to exist at the time of (36) my written Opinion are continuing unless shown to the contrary."

And now I interpolate the fact that I now have in front of me the positive statement that these conditions are continuing.

Now, continuing to read from the proceedings of May 24:

"However, it is my understanding of the law and it is the position of the Court that the matters set forth in paragraph 3 relate to the affirmative defense asserted by defendant Uncle Bill's. Accordingly, the

burden of proof rests upon Uncle Bill's in this respect. Nevertheless, because of the assumption previously made about continuing conditions, it is my thought that the practice of giving Double Eagle Stamps on Tuesday on the purchase of Rubbermaid fair-traded products, if shown to be still continuing, would meet prima-facie, at least, the burden of proof and would require Rubbermaid to go forward to overcome or rebut the showing of such prima-facie proof."

We have now a positive finding that this practice has continued and, therefore, the prima-facie condition described here certainly arises.

And then I went on to make this statement:

"There are some other statements made, and I have indicated that I certainly would not assume that a letter of Rubbermaid directing The May Company to cease and desist standing alone would be sufficient. I would certainly have to consider the whole thing in the context of the contract under which Rubbermaid and The May Company have been carrying on their relationship with reference to all other matters."

(37) Now, proceeding then to the hearing of June 17, at the conclusion of the exchange that occurred there, Mr. McClatchey made a statement along these lines—not along these lines—but quoted verbatim:

"Your Honor, the day before we filed the suit I called Mr. Wellman, counsel for The May Company, and said, 'If we do not obtain the injunction, we are going to cut you off. If we do obtain the injunction and you decide to cut us off, there is no sense in our filing the lawsuit.' "

"He said,"—that would be Mr. Wellman— 'Unless I call you, file your lawsuit.' He never called me; and I assume that if we obtain the injunction they will comply. He reaffirmed that position in Judge Connell's chambers."

"The Court: It sums up to this, if Judge Connell grants the injunction, The May Company will comply; and if Judge Connell refuses, you will cut off."

The record shows before me that Judge Connell has refused the injunction, but that Rubbermaid has not terminated its contract with The May Company. It seems to me, gentlemen, that this matter has now proceeded to the point where a definitive ruling must be made by this Court.

In addition to the matters alluded to in my Opinion which, it seemed to me, give certain built-in enforcement powers, and which, it seems to me, there is no evidence that they have used or utilized, (38) there is the further fact that as early as May 24 I brought up the matters of the contract; and I have before me the clear representation of counsel for Rubbermaid that it would terminate the contract as of any time that Judge Connell would refuse the injunction.

Now, I certainly don't raise that in terms of them changing their position. I realize you are now confronted with a different problem. However, I am not confronted with a different problem. I am still confronted with the same problem that faced me on March 5, on May 24 and on June 17. It is my considered judgment that Rubbermaid has not shown the necessary diligence in that they have not terminated the contract with May Company and they have not exercised the built-in enforcement powers to which reference was made in the Opinion.

Accordingly, after due consideration, the Court feels compelled to and does at this time cancel the conditional injunction previously ordered by this Court. A journal entry may be prepared so that this is clear, and in the final order there will be no question but there shall be a full right of appeal from this judgment.

COURT OF APPEALS' MEMORANDUM TO LAWYERS.

(Dated April 25, 1967.)

In this action plaintiff sought (a) an injunction against the defendant selling plaintiff's fair traded products at prices approximately 33⅓% below plaintiff's fair trade prices and (b) statutory attorney fees.

Following trial, the trial court found that plaintiff had established all elements of its prima facie case. For the purpose of this memorandum, it will not be necessary to set out at length the findings of the court, since counsel are familiar with them.

The trial court found that the plaintiff was entitled to a permanent injunction against defendant further selling of plaintiff's fair traded products below plaintiff's fair trade prices unless defendant established one of its affirmative defenses.

All affirmative defenses, save one, were rejected by the court. The only basis upon which the court denied a permanent injunction to plaintiff was its holding that plaintiff had not diligently and fairly enforced its fair trade program.

In so holding, the trial court found:

(a) that the practice of The May Company in giving one additional trading stamp per 10 cents on cash purchases of plaintiff's fair traded products on Tuesday was a violation of the Ohio Fair Trade Law, and

(b) that The May Company's "double stamp" practice constituted a bar to the enforcement of plaintiff's fair trade program against the defendant.

On the question as to whether or not the practice of The May Company giving double stamps for cash purchases on Tuesday of each week, which applies to the cash

purchase of any item in its stores including plaintiff's products, constitutes a violation of the fair trade law, the question was at issue in an earlier unreported case in the Court of Common Pleas, No. 795,634, *John P. Sedlak, Inc. vs. The Magnavox Co.*, wherein the trial court there rejected the defense that The May Company's practice violated the Ohio Fair Trade Law.

Following the trial court's ruling in the instant case, but prior to finally denying the injunctive relief sought, plaintiff filed a fair trade action in the Court of Common Pleas against The May Company seeking an injunction and attorney fees. The case was removed to Federal Court. It was there heard and decided. The court there denied plaintiff's prayer for injunctive relief against The May Company; the district court refused to follow the reasoning and holding of the trial court in this case that the double stamp practice was a violation of the fair trade law. That decision is presently pending on appeal in the Sixth Circuit Court of Appeals.

As long ago as 1942, with the decision of the California court in the case of *Weco Products Co. vs. Mid-City Cut Rate Drug Stores*, 55 Cal. App. 2d 684, and a line of similar decisions, the courts have held that giving trading stamps did not constitute a violation of the fair trade law.

The court in the instant case conditioned plaintiff's right to an injunction against the defendant upon the cessation of The May Company's practice. In effect, the court ruled that anything less than a cessation of The May Company's practice or a termination of plaintiff's contractual relation with The May Company would bar relief against defendant.

In reviewing the record in this case, it is apparent that the plaintiff has 1100 fair trade contracts in the State of Ohio and 150 in Cuyahoga County. With the exception

of the defendant in Cuyahoga County, and The May Company, in the holding of the trial court no one in the entire state sells plaintiff's fair traded products below fair trade prices. From an examination of the cases in other jurisdictions when violations had been claimed and disclosed, it strikes us that the enforcement of fair trade practices in Ohio by the plaintiff is practically perfect.

On examination of the authorities cited it is clear that the plaintiff's duty and obligation in enforcing its fair trade program is one of reasonable diligence. See, *Bulova Watch Co., Inc. vs. Klein on the Square, Inc.*, 1965 CCH Trade Cases No. 71,407 (N. Y. Sup. Ct. 1965); *General Electric Co. vs. R. H. Macy & Co.*, 1950-1951 Trade Cases No. 62,764; *National Distillers and Chemical Corp. vs. R. H. Macy & Co., Inc.*, 1965 CCH Trade Cases No. 71,423 (N. Y. App. Div. 1965), and cases cited therein; *Automotive Electric Service Corp. vs. Times Square Stores Corp.*, 175 Misc. 865, 24 N. Y. S. 2d 733 (N. Y. Sup. Ct. 1940).

A fair trader need not bring suit against every violator. See, *Revere Copper & Brass, Inc. vs. The Economy Sales Co.*, 127 F. Supp. 739 (D. Conn. 1954); *Shulton, Inc. v. 58 West 34th Street*, 1964 CCH Trade Cases No. 71,169 (N. Y. Sup. Ct. 1964).

It is interesting to note that fair trade injunctions have been granted in cases where there were four violators at the time the injunction was granted, *Lionel Corp. vs. Klein*, 1955 CCH Trade Cases, No. 68,085 (Del. Ch. Ct. 1955); where there were seven violators, *Gillette Co. vs. G. E. M. of San Jose, Inc.*, 1962 CCH Trade Cases, No. 70,293 (Calif. Super. Ct. 1962), and where 2.2% of all retail outlets were found to be violators, *Dart Drug Corp. of Maryland vs. Eli Lilly & Co.*, 1958 CCH Trade Cases, No. 68,969 (Md. 1958).

In *General Electric Co. vs. Home Utilities Company, Inc.*, 1955 CCH Trade Cases No. 68,148 (D. Md. 1955), the federal district court found diligent enforcement, and granted a fair trade injunction, where there were sixty-nine violators out of one thousand retailers. In the present case, there is one violator out of eleven hundred retailers. Yet the trial court found lack of diligent enforcement on the basis of this one violation.

Notwithstanding that plaintiff herein sought an injunction against The May Company, as above noted, unsuccessfully, the court imposed its rather unique requirement that plaintiff be required to cancel its contract with The May Company. A review of the cases cited with respect to that problem indicates that no such requirement is necessary. See, *The Upjohn Company vs. Ace Prescription Center, Inc.*

The trial court held, however, that filing and prosecuting suit against The May Company was not enough. It refused to make the injunction absolute unless plaintiff terminated its contract with The May Company. In so holding, the trial court imposed a requirement that is unique in fair trade cases. No court has ever required a manufacturer to cancel its agreement with a retailer—particularly where the manufacturer has filed suit to enjoin the retailer—as a condition of obtaining relief in a fair trade case. On the contrary, the law is clear that a manufacturer is under no obligation to cancel its agreement with the retailer, particularly where demand has been made on the retailer, to comply with plaintiff's fair trade prices and a suit to enjoin the alleged price cutting has been filed. Thus, in *The Upjohn Company vs. Ace Prescription Center, Inc.*, 1964 CCH Trade Cases No. 71,142 (S. D. N. Y. 1964), the federal district court stated:

"It is clear under the New York cases that a manufacturer is under no obligation to stop selling to a price cutting retailer. The fact that the parties have continued to do business with each other during the pendency of the law suit is no ground for denying an injunction.

"Columbia Records v. Goody, 278 App. Div. 401 (1950-1951 Trade Cases No. 62,866) 105 N. Y. S. 2d 659 (1st Dept. 1951).

"General Electric Co. v. R. H. Macy & Co., 103 N. Y. S. 2d 440 (Sup. Ct. N. Y. Co. 1951).

"General Electric Co. v. S. Klein-on-the-Square (1963 Trade Cases No. 67,443) 121 N. Y. S. 2d 37 (Sup. Ct. N. Y. Co. 1953)."

The premise of the trial court's holding, that The May Company's practice barred relief against defendant, is that it is inequitable to require one retailer (the defendant) to observe plaintiff's fair trade prices when another retailer (The May Company) is permitted to "sell" below those prices. Yet the result of the trial court's reasoning is not to put all retailers on equal footing—because all eleven hundred retailers in Ohio (and 150 in this county) except defendant have agreed in writing to maintain plaintiff's fair trade prices—but rather to permit defendant to continue, willfully and flagrantly, to sell at 33⅓% below plaintiff's fair trade prices—far below the price at which the other retailers sell.

It is far more consistent with equitable principles to put defendant on an equal footing with all other retailers, including The May Company, by granting defendant the benefit of the cash discount provision of plaintiff's fair trade agreement, than to bar relief entirely against defendant's willful 33⅓% price cutting—to the continued prejudice of all other retailers of plaintiff's fair traded

products, and the ultimate destruction of plaintiff's fair trade program.

We therefore conclude and hold

(a) that The May Company's practice of giving one additional trading stamp per 10¢ on cash purchases on Tuesday does not violate the Ohio Fair Trade Law;

(b) that plaintiff's right to injunction against the defendant is not dependent upon plaintiff's termination of its contract with The May Company;

(c) that plaintiff's right to injunctive process against the defendant is dependent upon plaintiff's obligation to use reasonable diligence in enforcing its fair trade program and that in the instant case, its program of enforcement has met the standard of reasonable diligence.

We therefore conclude and hold that the trial court committed prejudicial error in refusing to grant plaintiff the injunctive relief it sought against the defendant.

It is our determination that the plaintiff herein, in addition to injunctive relief, is entitled to recover its reasonable attorney fees incurred in its action to enforce its fair trade program.

The judgment of the Court of Common Pleas is reversed for the reasons stated herein and the cause is remanded to said court with instructions to grant to plaintiff a permanent injunction as prayed for, and to determine a reasonable amount of attorney fees to which plaintiff is entitled.

Exceptions. Order see journal.

ARTL, C.J., CORRIGAN, J., and WASSERMAN, J. concur.

JOURNAL ENTRY OF THE COURT OF APPEALS.

(Filed May 24, 1967.)

This cause having come on for hearing as an appeal on questions of law upon the original papers, assignments of error, partial bill of exceptions, transcript of the docket and journal entries in the Court of Common Pleas of Cuyahoga County, Ohio, and the briefs, and was argued by counsel and submitted to the Court.

Upon consideration whereof, this Court finds that in the record and proceedings aforesaid there is error manifest upon the face of the record to the prejudice of the appellant in this, to wit: The Court of Common Pleas erred in denying plaintiff-appellant the injunctive relief it sought against the defendant-appellee; and erred in holding that plaintiff-appellant was not entitled to recover from defendant-appellee reasonable attorney fees as provided in section 1333.32(B), Ohio Revised Code.

IT IS THEREFORE CONSIDERED, ADJUDGED AND DECREED by this Court that the judgment of the Court of Common Pleas of Cuyahoga County (except for that part of the judgment contained in paragraph 2 of said Court's May 24, 1965 Journal Entry, no appeal having been taken from said paragraph 2), be and the same is hereby reversed and held for naught.

IT IS FURTHER ORDERED that this cause be remanded to the Court of Common Pleas of Cuyahoga County for the entry of a permanent injunction in accordance herewith and as prayed for by plaintiff-appellant, and for the determination of reasonable attorney fees to be allowed to plaintiff-appellant against defendant-appellee.

IT IS FURTHER ORDERED that plaintiff-appellant recover its court costs of defendant-appellee in this Court and in the Court of Common Pleas.

To all of which defendant-appellee excepts.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR CUYAHOGA COUNTY TO CERTIFY ITS RECORD.

(Entered November 1, 1967.)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY.

(Entered November 1, 1967.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

MANDATE OF THE SUPREME COURT OF OHIO.

(November 1, 1967.)

To the Honorable Common Pleas Court
Within and for the County of Cuyahoga, Ohio,
Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, sua sponte, no substantial constitutional question involved.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(Entered November 29, 1967.)

It is ordered by the court that rehearing in this case is denied.

ORDER OF THE UNITED STATES SUPREME COURT EXTENDING TIME FOR DOCKETING.

(Entered February 27, 1968.)

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled case be, and the same is hereby, extended to and including April 12, 1968.

/s/ POTTER STEWART,
Associate Justice of the Supreme Court of the United States.

Dated this 27th day of February, 1968.

CONSTITUTION AND STATUTES.

Amendment [XIV] of the United States Constitution.

[RIGHTS OF CITIZENS.]

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. 1257. State courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(Act of June 19, 1936, Chap. 592, 49 Stat. 1526; 15 U. S. Code, Secs. 13, 13a, 13b, 21a.)

An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

§ 13(a) [Clayton Act] That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only

due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Payments for Services and Facilities Furnished by Customer—Advertising Allowances.]

§ 13(d) "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of

such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Furnishing Services or Facilities.]

§ 13(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

[Inducing or Receiving Discriminatory Price.]

§ 13(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." [June 19, 1936, Chap. 592, Sec. 1, 49 Stat. 1526; 15 U. S. Code, Sec. 13.]

§ 1333.27 Purpose and policy.

(A) Sections 1333.27 to 1333.34, inclusive, of the Revised Code are enacted in the exercise of the police powers of the state and in pursuance of the power specifi-

cally granted the general assembly by the people in Section 2 of Article XIII, Ohio Constitution, to regulate the sale and conveyance of personal property, and the purposes of sections 1333.27 to 1333.34, inclusive, of the Revised Code, are generally to protect and preserve small business, to safeguard the good will of trade-marks and trade names, to further wholesome competition, to prevent monopoly in the distribution of goods, and to promote the public welfare by securing wider distribution of commodities and an increase in the production thereof, and thereby reducing production and distribution costs, protecting and increasing gainful employment in manufacturing, wholesaling and retailing, all for the benefit of the consumer and the well-being of the citizens of the state.

(B) It is the further purpose of sections 1333.27 to 1333.34, inclusive, of the Revised Code, to promote the distribution in commerce in the state of identified merchandise which is in free and open competition with other articles of the same general class. Where fair, equitable, and competitive prices cannot be maintained in all appropriate stages in the distribution of such identified merchandise, the marketing of such merchandise is depressed and the quantity thereof moving in the channels of commerce in the state declines.

(C) To remove obstructions to the marketing of identified merchandise in commerce which are occasioned by unfair selling practices, it is the policy of the state to afford distributors of identified merchandise an effective means whereby the sale of such merchandise at all appropriate stages of distribution may be consummated at prices adequate to stimulate distribution and low enough to enable distributors of such identified merchandise to compete effectively with those marketing other goods, who by size and dominance may distribute such goods through

their own retail outlets or by franchise or consignment methods, and to satisfy the needs of ultimate consumers.

§ 1333.28 Definitions.

As used in sections 1333.27 to 1333.34, inclusive, of the Revised Code:

(A) "Commodity" means any subject of commerce.

(B) "Producer" means any grower, baker, maker, manufacturer, bottler, packer, converter, processor, or publisher.

(C) "Wholesaler" means any person selling a commodity other than a producer or retailer.

(D) "Retailer" means any person engaged in business selling a commodity to consumers for use.

(E) "Distributor" means any person who acquires a commodity for the purpose of resale.

(F) "Person" means an individual, corporation, partnership, association, joint-stock company, business trust, or any unincorporated organization.

(G) "Trade-mark" means any word, name, symbol, or device, or any combination thereof, used by a producer or distributor to identify his commodity and distinguish it from that produced or distributed by others.

(H) "Trade name" means personal names, and any word, words, symbol, or symbols, used by producers or distributors to identify their companies, firms, or corporations.

(I) "Contract" means any agreement, written or verbal, or arising from the acts of the parties. The establishment by a proprietor of a minimum resale price for any commodity pursuant to the provisions of section 1333.29 of the Revised Code and the proprietor's permission for a

distributor to acquire and use the proprietor's interest in the trade-mark or trade name in reselling the commodity shall constitute a contract and sufficient consideration from the proprietor for a promise by the distributor not to sell such commodity at less than the minimum price established by the proprietor. Any distributor (whether he acquires such commodity directly from the proprietor or otherwise) who, with notice that the proprietor has established a minimum resale price for a commodity, accepts such commodity shall thereby have entered into an agreement with such proprietor not to resell such commodity at less than the minimum price stipulated therefor by such proprietor.

(J) "Notice" means actual notice given by any method provided in section 1333.30 of the Revised Code, or otherwise established by legally admissible evidence.

(K) "Proprietor" means:

(1) A person who identifies a commodity produced by him by the use of his trade-mark or trade name, unless he has specifically granted to another person sole authority to establish minimum resale prices for such commodity;

(2) A person who identifies a commodity distributed by him by the use of his own trade-mark or trade name;

(3) A person who has been specifically granted by the producer or distributor of a commodity which is identified by the trade-mark or trade name of such producer or distributor the sole authority to establish minimum resale prices for such commodity in the state.

§ 1333.29 Contracts or notices establishing minimum resale prices.

(A) It shall be lawful, anything in sections 1331.01 to 1331.14 of the Revised Code or otherwise provided in

the Revised Code to the contrary notwithstanding, for a proprietor to establish and control by notice to distributors or by contract, stipulated minimum resale prices for a commodity of which he is the proprietor and which is in free and open competition with commodities of the same general class produced by others and offered for sale in the same general market area. Such minimum resale prices may be differentiated as to various levels of distribution, provided such differentiations are not otherwise unlawfully discriminatory. Such prices may be changed from time to time by written notice to distributors who acquire such commodity with notice of any established minimum resale price. A proprietor may so establish such minimum resale prices for his wholesale distributors, notwithstanding section 1333.34 of the Revised Code, even though he sells such commodity to retailers in competition with such wholesale distributors, if such sales to retailers are made at prices not less than those he establishes for such wholesale distributors for comparable sales.

(B) Any such contract or notice may contain the following provisions:

(1) That the buyer will not resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which the buyer resells the same;

(2) That the buyer will require from any distributor to whom he may resell such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor thereof for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell;

(3) That the seller will require from any other distributor to whom he may sell other items of such commodity an agreement that such distributor will not, in turn, resell such commodity at less than the minimum resale price stipulated by the proprietor for the level of distribution at which such distributor resells and that such distributor, if he resells to another distributor, will make the same agreement with the distributor to whom he may resell.

(C) Any contract or notice authorized by and entered into pursuant to any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall be for the benefit of the proprietor and any distributor who is bound by a similar contract or notice.

§ 1333.30 Evidence of notice.

Actual notice of stipulated minimum resale prices may be given to any person by mail, through advertising, or through notice attached to merchandise, to containers, packages, or dispensers thereof, or on the invoice therefor, or imparted orally. Deposit in the United States mail, with postage prepaid, of a letter properly addressed to a distributor and specifying minimum resale prices established by a proprietor shall constitute prima facie evidence of actual notice to said distributor of such resale prices. The acquisition of or dealing in merchandise clearly marked, or enclosed in containers, packages or dispensers clearly marked, or the invoice for which was clearly marked, with minimum resale prices established by a proprietor shall be conclusive evidence of actual notice of such minimum resale prices. Actual notice may also be otherwise established by legally admissible evidence. A person with actual notice of any applicable minimum resale price is thereby charged with notice that such a price is subject to change.

§ 1333.31 Retention of proprietary interests.

A proprietor shall retain a proprietary interest in any commodity with respect to which he is a proprietor after he has sold it to distributors, so long as such commodity continues to be identified by his trade-mark or trade name, by reason of his interest in stimulating demand for such commodity through effective distribution to ultimate consumers and of his interest in continuing protection of the good will associated with his trade-mark or trade name.

§ 1333.32 Unfair competition; remedies.

(A) Except as provided in section 1333.33 of the Revised Code, it shall be unlawful and an act of unfair competition for any distributor with notice that a proprietor has established a stipulated minimum resale price for a commodity of which he is the proprietor or for any distributor who is in contract with a proprietor not to sell a commodity for which such proprietor has established a stipulated minimum resale price at less than such stipulated minimum resale price, to sell, offer to sell, or advertise such a commodity for sale at a price lower than such stipulated minimum resale price. In determining whether the sale or offer to sell or advertisement for sale of any commodity is below the stipulated minimum resale price established by the proprietor for such commodity there shall be deducted from the price at which such commodity is sold, offered for sale, or advertised for sale the value of any article or thing of exchange or extrinsic value or any concession made, whether by the giving of coupons or otherwise, which is given or to be given in connection with such sale or offering to sell and the sale or offering for sale of such commodity with any other commodity for a single or combined price, or the giving of or offering to give any credit or allowance in excess of the actual market value thereof,

or the failure to add any tax occasioned by or upon the sale of such commodity shall also be taken into consideration in determining whether such sale, offer to sell, or advertisement for sale is below the minimum resale price stipulated for such commodity by the proprietor, provided the allowance by a distributor to his customers of trading stamps or other redeemable certificates, when the amount or value of such allowance does not exceed three per cent of such stipulated minimum resale price, where the posted or advertised price of any commodity or commodities is not less than the stipulated minimum resale price thereof, shall not constitute the offering or making of a gift or concession prohibited by this section nor a violation of any of the provisions of sections 1333.27 to 1333.34, inclusive, of the Revised Code.

(B) Any person suffering or reasonably anticipating damage by reason of a violation of this section may bring suit in any court of competent jurisdiction in the state to:

(1) Recover the amount of damages sustained as a result thereof;

(2) Obtain injunctive relief whether or not specific monetary damages are established;

(3) Recover the costs of suit, including reasonable attorney fees, which costs and attorney fees may be recovered whether or not specific monetary damages are established.

(C) It shall be no defense to a prayer for an injunction in any such action that there is an adequate remedy at law.

§ 1333.33 Exceptions.

It shall be a defense to an alleged violation of section 1333.32 of the Revised Code, for a distributor to prove

that a commodity has been advertised, offered for sale, or sold:

(A) In closing out such distributor's stock of such commodity for the bona fide purpose of discontinuing dealing in such commodity and plain notice of that fact is given to the public; provided, the distributor of such stock shall give to the proprietor of such commodity prompt and reasonable notice in writing of his intention to close out such stock, and an opportunity to purchase such stock of such commodity at the original invoice price;

(B) When the stock of such commodity is altered, secondhand, damaged, defaced, or deteriorated and plain notice of that fact is given to the public in the advertisement and sale thereof, such notice to be conspicuously displayed in all advertisements and affixed to the commodity;

(C) By an officer acting under an order of court;

(D) After the distributor has removed from such commodity all trace of the proprietor's identifying trademark or trade name and that in such sale or offer to sell or advertisement for sale no statement, representation, or suggestion of any kind is made which would identify such commodity with the trade-mark or trade name of the proprietor.

§ 1333.34 Exempt agreements.

Sections 1333.27 to 1333.34, inclusive, of the Revised Code, shall not, except as otherwise specifically provided in section 1333.29 of the Revised Code, apply to any contract, agreement, or understanding between or among producers, or between or among distributors, or between or among wholesalers.

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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 1318.

CLABER DISTRIBUTING COMPANY,
Appellant,

vs.

RUBBERMAID, INC.,
Appellee.

MOTION TO DISMISS OR AFFIRM.

On Appeal From the Supreme Court of the State of Ohio.

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Newman v. Piggie Park Enterprises, Inc., ___ S. Ct. ___, 36 U. S. Law 4243 (1968) ---------- 11, 13, 14

Olin Mathieson Chemical Corp. v. The Ontario Store of Prioe Hill, Ohio, Inc., 9 Ohio St. 2d 67 (1967) - 10

Olin Mathieson Chemical Corp., Winchester Western Division v. The Ontario Store of Toledo, Ohio, Inc., Vol. XL, Ohio Bar No. 18, p. 570 (1967) -- 10

Scripto, Inc. v. Carson, 362 U. S. 207, 80 S. Ct. 619 (1960) ---------- 9

State ex rel. Mecartney v. Hummel, 52 Ohio L. Abs. 55 (Franklin County 1948) ---------- 12

Stembridge v. Georgia, 343 U. S. 541, 72 S. Ct. 834 (1952) ---------- 9

Symons v. Eichelberger, 110 Ohio St. 224 (1924) ---- 11

Williams v. Kaiser, Warden, 323 U. S. 471, 65 S. Ct. 363 (1945) ---------- 8

Constitution and Statutes.

Clayton Act, 15 U. S. C. Sec. 15 ----------12, 22

Constitution of the United States, Fourteenth Amendment ---------- 5, 7

McGuire Act, 15 U. S. C. Sec. 45 ----------12, 20

Ohio Fair Trade Law, Ohio Revised Code:

Sections 1333.27 through 1333.34 ---------- 2

Section 1333.32(B) ----------2, 5, 9, 11

Sherman Act as Amended by Miller-Tydings Act, 15 U. S. C. Sec. 1 ----------12, 19

28 U. S. C. Sec. 1257(2) ---------- 5

In the Supreme Court of the United States

OCTOBER TERM, 1967.

No. 1310.

CLABER DISTRIBUTING COMPANY,

Appellant,

vs.

RUBBERMAID, INC.,

Appellee.

MOTION TO DISMISS OR AFFIRM

On Appeal From the Supreme Court of the State of Ohio.

Rubbermaid, Inc., appellee, hereby moves, pursuant to Rule 16, to:

(1) dismiss this appeal on the grounds (a) that the appeal does not present a substantial federal question; (b) that any federal question sought to be reviewed was not timely or properly raised, or expressly passed on by the Supreme Court of Ohio; and (c) the judgment of the Supreme Court of Ohio rests on an adequate non-federal basis; and

(2) in the alternative, if federal questions are deemed to exist, to affirm the judgment of the Supreme Court of Ohio on the ground that such federal questions are so well settled and unsubstantial as not to require further argument.

STATEMENT.

This case, reduced to the elemental terms which befit its limited and parochial nature, is an action under the Ohio Fair Trade Law, Ohio Revised Code, Sections 1333.27 through 1333.34. The basic constitutionality of the Ohio Fair Trade Law was affirmed in 1963 by the Ohio Supreme Court. *Hudson Distributor's Inc. v. The Upjohn Co.*, 174 Ohio St. 487 (1963) (later in turn affirmed by the Supreme Court of the United States at 377 U. S. 386, 84 S. Ct. 1273). Promptly thereafter Rubbermaid filed the present action.

Plaintiff-appellee Rubbermaid, Inc. sought to enjoin defendant-appellant Claber Distributing Company of Cleveland, Inc. from selling Rubbermaid's fair traded products at prices approximately 33⅓ per cent below Rubbermaid's established fair trade prices. Rubbermaid also requested an allowance of costs, including reasonable attorney fees, as provided in Section 1333.32(B), Ohio Revised Code.

Much of the procedural history, not completely recounted in appellant's Jurisdictional Statement, is presently irrelevant. Initially the trial court granted Rubbermaid an injunction, conditioned on the cessation by The May Company, a non-party but a presumed competitor of Claber, of the practice of giving one additional trading stamp per ten cents on cash purchases of Rubbermaid's fair traded products on Tuesdays. On the question of attorney fees, the trial court upheld the statute but denied Rubbermaid its recovery on the subjective ground that Claber's bad faith in conducting its defense had not been shown. Appellant's Appendix, p. 1a.

The condition attached to the injunction was premised on the trial court's conclusion that The May Company's "double stamp" practice was a violation of the Ohio

Fair Trade Law. Rubbermaid promptly sued The May Company; the case was removed by The May Company to the United States District Court for the Northern District of Ohio; the district court in due course ruled that the "double stamp" practice was *not* a violation of the Ohio Fair Trade Law; and the suit against The May Company was thereupon dismissed.[1]

In the present suit against Claber the trial court then dissolved the conditional injunction, solely on the ground that Rubbermaid, having failed to stop The May Company's "double stamp" practice, had not diligently and fairly enforced its fair trade program. Appellant's Appendix, p. 4a.

Rubbermaid thereupon appealed to the Court of Appeals of Cuyahoga County, assigning as errors (a) the trial court's construction of the Ohio Fair Trade Law as it pertained to trading stamps and (b) the trial court's application of a subjective test of "bad faith" to the provision for statutory attorney fees. Appellee's Appendix, p. 16.

[Claber Distributing also appealed from the trial court's judgment for dismissing its various defenses, other than the trading stamp question. Claber based its appeal on the ground that the Ohio Fair Trade Law violated the *Ohio* Constitution. Appellee's Appendix, p. 17. This appeal was later voluntarily abandoned by Claber, and its appeal was thereupon dismissed. Appellee's Appendix, p. 18.]

The Court of Appeals, acting on Rubbermaid's appeal, reversed the trial court. On the issue of diligent enforcement, the Court of Appeals held that The May Company's

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[1] The history of this litigation as it involved the separate suit against The May Company is recounted in the opinion of the Court of Appeals. Appellant's Appendix, pp. 41a-46a.

"double stamp" practice was *not* a violation of the Ohio Fair Trade Law and, Rubbermaid's enforcement program having been otherwise perfect, that Rubbermaid was entitled as a matter of law to a permanent injunction against Claber's continuing violations. On the issue of statutory attorney fees, the Court of Appeals rejected Claber's contention that the statute was invalid and directed the trial court to determine and allow Rubbermaid its costs, including reasonable attorney fees. Appellant's Appendix, pp. 46a-47a.

Claber noticed an appeal to the Supreme Court of Ohio and also moved the Court for an order directing the Court of Appeals to certify its record. The Supreme Court of Ohio overruled the motion to certify and dismissed the appeal as of right "for the reason that no substantial constitutional question exists herein." Appellant's Appendix, p. 48a. A subsequent motion for rehearing was likewise denied. Appellant's Appendix, p. 49a.

It is on this state of the record that Claber now claims to have drawn into question the validity of the Ohio Fair Trade Law under the due process and equal protection clauses of the Fourteenth Amendment.

ARGUMENT.

I. There is no substantial federal question presented by this appeal, and none was properly raised in or expressly passed on by the Supreme Court of Ohio.

The premise of Claber's appeal to this Court must necessarily be that jurisdiction under 28 USC Section 1257(2) arises because Section 1333.32(B) of the Ohio Fair Trade Law violates the Fourteenth Amendment. This is Claber's Question 1 at page 6 of its Jurisdictional Statement; and this question is dealt with in a dozen paragraphs of argument commencing at page 14.

Reserving Question 1 for the moment, the remaining six of Claber's "Questions Presented" are merely restatements of strictly parochial issues, on their face devoid of any federal question or basis for review under Section 1257(2). Thus Questions 2, 4, 5, 6, and 7 restate the usual "defenses" in a state fair trade case of a discriminatory price structure, lack of enforcement, abandonment of the fair trade program and generalized inequity. All of these defenses involve the application of Ohio's Fair Trade Law, as interpreted by its courts, to the particularized facts of this case.

For example, the trial court found the facts against Claber on the "defenses" it now poses as Questions 2, 6 and 7 and in favor of Claber on its Questions 4 and 5. The Court of Appeals reversed the trial court's interpretation of Ohio law on Questions 4 and 5 and in effect affirmed the trial court on Questions 2, 6, and 7. At no time were these issues cast in terms which would warrant jurisdiction being assumed by the Supreme Court of the United States under 28 USC Section 1257(2): they were treated by Claber and by the Ohio courts, properly we believe, as purely state issues, not involving any federal question.

In a recasting of Question 2, Claber at page 13 and again at page 18 strains to extract a federal question out of what it characterizes as "discriminatory allowances" to claimed competitors; and Claber tries to smooth the argument's path by asserting that its "defense" was "ignored" or at least "overlooked" by the trial court.

There are multiple responses, each fatal to this asserted basis for Supreme Court jurisdiction:

(a) The trial court did not "ignore" the "discriminatory allowance" defense, it found expressly against Claber on both the facts and the law. Appellant's Appendix, pp. 25a-28a.

(b) The trial court did not "overlook" these Robinson-Patman claims of Claber, it ruled explicitly and correctly against them. Appellant's Appendix, p. 9a.

(c) Claber appealed from the ruling rejecting its claimed defense, based that appeal on Ohio Constitutional grounds *only*, then dismissed its own appeal and had a final and unappealed judgment entered against it. Appellee's Appendix, p. 18.

(d) When Rubbermaid instituted its own limited appeal from the trial court, Claber filed no cross appeal from the rejection of its defenses; and the single assignment of error by Claber in Rubbermaid's appeal was limited to the contention that the Ohio Fair Trade Law was unconstitutional under the *Ohio* Constitution, the same limited, non-federal ground previously abandoned and dismissed in Claber's own appeal. Appellee's Appendix, p. 19.

(e) Even assuming Claber had properly preserved federal questions for the present appeal, the claim in a fair trade action that there is a technical or even actual violation of the Robinson-Patman Act is, under long established precedent, an insufficient defense. *Bruce's Juices v.*

American Can Co., 330 U.S. 743, 67 S. Ct. 1015 (1947); *Carter Products, Inc. v. The Riteprice Merchandise, Inc.*, 23 N.Y. Misc. 2nd 230 (1960); *Esterbrook Pen Company v. San Juan F. Villarino 5 y 10, Inc.*, 144 F. Supp. 309 (D.C.P.R. 1956).

(f) And even if the claimed Robinson-Patman violation were cognizable in a fair trade case, Claber's appeal would fail in this instance since the trial court found no unreasonableness in Rubbermaid's price structure. Appellant's Appendix, pp. 9a, 27a. See *Lionel Corp. v. Klein*, 114 A. 2d 652, 1955 CCH Trade Cases, ¶ 68,085 (Del. 1955); *General Electric Co. v. S. Klein-on-the Square, Inc.*, 129 N.Y.L.J. 583, 1952-53 CCH Trade Cases, ¶ 67,443 (Sup. Ct. N.Y. 1953); and *General Electric Co. v. Veeds Television and Appliances Co., Inc.*, 129 N.Y.S. 2d 278, 1954 CCH Trade Cases, ¶ 67,672 (Sup. Ct. N.Y. 1954).

Question 3 is slightly different in focusing on the ruling of the Cuyahoga County Court of Appeals rather than the events in the trial court; and there is in Question 3 a somewhat mystic reference to the United States Constitution. Claber's contention now is that the Court of Appeals could not properly reverse its trial court without an explicit finding of "abuse of discretion." Claber did not argue, on its attempted appeal to the Supreme Court of Ohio, that the Fourteenth Amendment was involved—that idea gets injected for the first time in Question 3.

The contention in the state court was that, under Ohio law, a reviewing court ought not to disturb an equity ruling without explicitly and expressly finding an "abuse of discretion." Rubbermaid, on the other hand, pointed out that it is specious to assert that a particular form of words in a journal entry is necessary to support a reversal, particularly where the words "prejudicial error," as used by

the Court of Appeals, include, in Ohio, "abuse of discretion" and any other error the trial court may have committed. *Cieslikowski v. Radecki*, 100 Ohio App. 46, 135 N.E. 2d 433 (Lucas County 1955). And Claber is equally wrong in assuming that under the circumstances of this case there was any need to find an abuse of discretion by the trial court: the reversal was for an error of law in construing the Ohio Fair Trade Law and once this was remedied by the Court of Appeals there was nothing required of the trial court other than the entry of a permanent injunction and determination of costs.

Thus, with the possible exception of statutory attorneys fees, there is no foundation in the record, and really not much of a pretense in appellant's Jurisdictional Statement, to demonstrate that necessary criteria are present to support jurisdiction of this appeal. The applicable criteria are well stated in *Williams v. Kaiser, Warden*, 323 U. S. 471, 477-478, 65 S. Ct. 363 (1945):

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction and that its decision of the federal question was necessary for its determination of the cause. *Honeyman v. Hanan*, 300 U. S. 14, 18; *Lynch v. New York*, 293 U. S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger v. Missouri*, 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co. v. Skinner*, 139 U. S. 293, 297; *Allen v. Arguimbau*, 198 U. S. 149, 154-155; *Lynch v. New York, supra.*"

See also *Durley v. Mayo*, 351 U. S. 277, 281, 76 S. Ct. 806 (1955), rehearing denied, 352 U. S. 859, 77 S. Ct. 22;

Bell v. State of Maryland, 378 U. S. 226, 84 S. Ct. 1814 (1964).

These principles have added weight where, as here, the highest court of a state delivers no opinion and its judgment might have rested on a non-federal ground, such as failure to raise a federal issue in a lower court. *Stembridge v. Georgia*, 343 U. S. 541, 72 S. Ct. 834 (1952), and *Durley v. Mayo, supra*. See also *Scripto, Inc. v. Carson*, 362 U. S. 207, 80 S. Ct. 619 (1960). And the burden is on appellant to demonstrate that a federal question is necessarily presented. *Department of Mental Hygiene of Calif. v. Kirchner*, 380 U. S. 194, 197, 85 S. Ct. 871 (1965).

Virtually identical issues to those raised by Claber—including trading stamps—were resolved four square with the Ohio appellate rulings in *Gadol v. Dart Drug Corporation of Maryland*, 222 Md. 372, 161 A. 2d 122 (1960). The price cutting defendant then attempted to appeal as of right, just as Claber, and this Court dismissed for want of a substantial federal question. *Dart Drug Corp. of Md. v. Gadol*, 364 U. S. 444, 81 S. Ct. 236 (1960). There is no discernible basis for distinguishing this result from that urged by Rubbermaid on this appeal.

Indeed the only assertably "federal" issue extractable from Claber's Jurisdictional Statement is the claim that Section 1333.32(B), Ohio Revised Code, may violate the Fourteenth Amendment in permitting a successful plaintiff to recover "the costs of suit, including reasonable attorney fees." In view of Claber's initial appeal on Ohio grounds only, and the later voluntary dismissal (Appellee's Appendix, pp. 17-18), Rubbermaid has constantly challenged Claber's right to assert a federal issue in any of the appellate courts. It may be that the Ohio Supreme Court concurred and was not considering the federal question, in which event jurisdiction here should fail under the criteria discussed above.

Even if we disregard this possibility, no substantial federal question is here presented. The basic constitutionality of the Ohio Fair Trade Law has already been upheld by this Supreme Court in *Hudson Distributors, Inc. v. Eli Lilly Co.*, 377 U. S. 386, 84 S. Ct. 1273 (1964); and the constitutionality of the law for state purposes has since been reaffirmed by the Supreme Court of Ohio. *Olin Mathieson Chemical Corp. v. The Ontario Store of Price Hill, Ohio, Inc.*, 9 Ohio St. 2d 67 (1967); and *Olin Mathieson Chemical Corp., Winchester Western Division v. The Ontario Store of Toledo, Ohio, Inc.*, Vol. XL, Ohio Bar No. 18, p. 570 (1967). (The defendants in the last two cited cases were, like appellant Claber Distributing, subsidiaries of Cook Coffee Company, probably the largest volume retailer in Ohio.) Furthermore, the narrower issue of the federal constitutionality of a provision for recovery of attorney fees by a successful plaintiff is so well ingrained in federal law as to be beyond reasonable dispute. See authorities at pages 10-14, *infra*.

By reason of the foregoing multiple grounds existing under Rule 16, this appeal should be dismissed.

II. If federal questions are deemed properly raised by appellant, they are so well settled and unsubstantial as not to require further argument.

The only assertably federal question which Claber poses is whether it violates the equal protection clause for a state legislature, in furtherance of its public policy, to authorize recovery of reasonable attorney fees for successful plaintiffs without doing so for successful defendants. This is a constitutional issue which has been settled at least since *Missouri, Kansas & Texas Railway Company of Texas v. Cade*, 233 U. S. 642, 34 S. Ct. 678 (1914), which upheld a Texas statute authorizing attorney fees to

a successful plaintiff only. As Mr. Justice Pitney there said,

> "If the classification is otherwise reasonable, the mere fact that attorney's fees are allowed to successful plaintiffs only, and not to successful defendants, does not render the statute repugnant to the 'equal protection' clause." 233 U. S. at 650.

This principle has since been followed by the Supreme Court without deviation. *Missouri, Kansas & Texas Railway Co. of Texas v. Harris*, 234 U. S. 412, 32 S. Ct. 790 (1914); *Missouri Pacific Railway Company v. Larabee*, 234 U. S. 459, 34 S. Ct. 979 (1914); *Meeker & Co. v. Lehigh Valley Railroad Co.*, 236 U. S. 412, 35 S. Ct. 328 (1915); and *Chicago & Northwestern Railway Company v. Nye Schneider Fowler Company*, 260 U. S. 35, 43 S. Ct. 55 (1922). See also *Newman v. Piggie Park Enterprises, Inc.*, ___ S. Ct. ___, 36 U. S. Law Week 4243 (1968), discussed *infra* at pp. 13-14. Numerous state courts—including the Supreme Court of Ohio—have accepted and applied this principle of constitutionality. *E.g.*, *Gomes v. Bristol Manufacturing Corporation*, 95 R. I. 126, 184 A. 2d 787 (1962); *DeWitt v. State ex rel. Crabbe*, 108 Ohio St. 513 (1923). See also *Symons v. Eichelberger*, 110 Ohio St. 224 (1924).

Claber ignores these established precedents[2] and blitheringly urges that Section 1333.32(B) creates an un-

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[2] Claber does cite some long obsolete or obviously inapplicable cases. *Gulf C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 S. Ct. 255 (1897) held a fee statute invalid for unreasonable classification in singling out railway companies as distinguished from other debtors, *not* because successful plaintiffs alone were benefited; and the statute was later amended accordingly and upheld by the United States Supreme Court in *Missouri, Kansas & Texas Railway Company of Texas v. Cade*, *supra* at page 10. Moreover, *Missouri Pacific Ry. Co. v. Tucker*, 230 U. S. 340, 33

(Continued on following page)

reasonable classification by making those defendants found guilty of price cutting on fair traded products accountable for the reasonable attorney fees incurred by the plaintiffs who successfully enforce the state fair trade policy. The classification—fair trading plaintiffs as against price cutting defendants—is made under direct Congressional sanction: Miller-Tydings Act, 15 U. S. C. § 1; McGuire Act, 15 U. S. C. § 45. Moreover, the right of Ohio to make this classification was specifically upheld in *Hudson Distributors Inc. v. Eli Lilly & Co.*, 377 U. S. 386, 84 S. Ct. 1273 (1964).

The Clayton Act provides a useful analogy in that attorney's fees are awarded under Section 4 only to successful plaintiffs in private actions. 15 U. S. C. § 15. The right of Congress to provide for the remedy of treble damages, costs and "reasonable attorney's fees" was explicitly upheld in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U. S. 390, 27 S. Ct. 65 (1906).

It is well established that under the Clayton Act attorney's fees are awarded only to successful plaintiffs—not to successful defendants. *Gillam v. A. Shyman, Inc.*, 205 F. Supp. 534 (D. C. Alaska 1962). Indeed in *Byram Concretanks v. Warren Concrete Products Co. of N. J.*, 374 F. 2d 649 (3rd Cir. 1967), an award of attorney fees and

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(Continued from preceding page)

S. Ct. 961 (1913). struck down a liquidated damages statute as discriminatory and unreasonable—attorney fees were neither discussed nor in issue. Finally, Claber mentions *Coal Company v. Rosser*, 53 Ohio St. 12, 41 N. E. 263 (1895) where the inherent defect was the unequal and arbitrary treatment of members of the same class, not the fact of a statutory prescribed fee; and this case has for present purposes been effectively discarded by *DeWitt v. State ex rel. Crabbe*, 108 Ohio St. 513 (1923); and see *State ex rel. Mecartney v. Hummel*, 52 Ohio L. Abs. 55 (Franklin County 1948). Rubbermaid's views on these constitutional issues are also supported by the opinion of the trial court and the rulings of the Court of Appeals and Ohio Supreme Court below.

costs to a defendant was reversed "even though plaintiff's suit was baseless." The Third Circuit's rationale, unusually apt in the present context, appears at 374 F. 2d 651:

> "Our conclusion is based on policy considerations reflected in the Clayton Act. It is well known that a primary object of the private treble damage suit is to provide a means for the enforcement of the anti-trust laws in addition to Government prosecutions. The incentive which the prospect of treble damages provides for instituting private anti-trust actions would be dampened by the threat of assessment of defendant's attorney's fees and other costs as a penalty for failure."

This policy basis for a classification in favor of successful plaintiffs is even more urgent in the case of state fair trade laws where the entire burden of enforcement falls on private plaintiffs and a failure to enforce with diligence results in destruction of their fair trade program.

The most recent policy statement, directly analogous to Ohio's decision to entrust fair trade enforcement to private litigants, occurred this Term of Court in *Newman v. Piggie Park Enterprises, Inc.*, __ S. Ct. __, 36 U. S. Law Week 4243 (1968):

> "* * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II." 36 U. S. Law Week at 4244.

The Fourth Circuit in *Newman* had applied a subjective test of "bad faith" to the applicable statute, just as

the trial court did in the first instance herein. The Court of Appeals, and in turn the Supreme Court of Ohio, rejected this standard in favor of a direct application of the statute, just as the United States Supreme Court did in *Newman*. While fair trade does not occupy the same priority plane as the Civil Rights Act, the federal question for present purposes is the same. The announced public policy of Ohio, as expressed in its Fair Trade Law, is to encourage fair trading of quality, trademarked merchandise. To carry out this policy, the law authorizes private enforcement and permits a successful plaintiff the recovery of reasonable attorney fees.

It certainly creates no federal issue for Claber, of all persons, to cry inequity. This defendant willfully, flagrantly and continuously cut the fair trade prices of plaintiff's products by 33⅓ per cent—in direct, substantial and knowing violation of the state's policy of encouraging fair trade; it chose to defy the state's fair trade policy; and it sought to destroy plaintiff's fair trade program rather than sell products of another manufacturer with which plaintiff's products were in free and open competition.

The policy of the Ohio legislature is thus clear. The statutory remedy is explicit. The classification between fair trading plaintiffs and price cutting defendants is reasonable and well within established precedents, including the Clayton, Miller-Tydings and McGuire Acts and the policy statements of this Supreme Court from *Cade* in 1914 through *Newman* in 1968.

Any federal questions sought to be raised by appellant herein are so well settled and unsubstantial as not to warrant further argument. The decision below should be affirmed.

CONCLUSION.

For the foregoing reasons, appellant's appeal should be dismissed or, in the alternative, the judgment of the Supreme Court of Ohio upholding the prior judgment of the Court of Appeals of Cuyahoga County should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.

APPENDIX.

ASSIGNMENT OF ERROR IN COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY, FILED BY RUBBERMAID, INC., PLAINTIFF-APPELLANT IN SAID COURT OF APPEALS.

The judgment of the Court of Common Pleas of Cuyahoga County, cancelling and denying an injunction granted to plaintiff against defendant, and denying attorneys' fees to plaintiff, is contrary to law and should be reversed because of the following errors:

1. The Trial Court Erred in Holding that Plaintiff Had Not Diligently and Fairly Enforced Its Fair Trade Program.

A. The Trial Court Erred in Concluding that The May Company's Practice of Giving One Additional Trading Stamp Per 10 Cents on Cash Purchases on Tuesday Violates The Ohio Fair Trade Law.

B. The Trial Court Erred in Conditioning Plaintiff's Right to an Injunction Against Defendant Upon the Cessation of The May Company's Practice.

C. The Trial Court Erred in Not Making The Injunction Absolute After the Plaintiff Filed and Prosecuted an Action to Enjoin The May Company's Practice, and After a Court of Competent Jurisdiction Refused to Follow the Trial Court in This Case and Refused to Hold That The May Company's Practice Violated the Ohio Fair Trade Law.

2. The Trial Court Erred in Holding That Plaintiff Was Not Entitled to Recover Statutory Attorney Fees.

A. The Public Policy of This State Requires That Attorney Fees Be Awarded in a Fair Trade Case When the Plaintiff Prevails.

B. If There Is Discretion to Award Attorney Fees, Then Such Discretion Should Have Been Exercised by the Trial Court so as to Award Attorney Fees to Plaintiff.

NOTICE BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC. OF ITS APPEAL TO COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

The Defendant-appellant, Claber Distributing Company of Cleveland, Inc., hereby gives notice of appeal on questions of law to the Court of Appeals for the Eighth Judicial District of Ohio, Cuyahoga County, from the judgment and final order rendered against defendant on May 24, 1965, for the reason that Sections 1333.27 through 1333.34 of the Ohio Revised Code, upon which plaintiff-appellee's action is predicated, violate and contravene the provisions of the Ohio Constitution, and are therefore invalid.

METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY & STERN,
Attorneys for Defendant-Appellant.

Of Counsel:
ELMER I. SCHWARTZ,
DONALD M. ROBINER.

CERTIFICATE OF SERVICE.

A copy of the foregoing Notice of Appeal was mailed to Thompson, Hine and Flory, 1100 National City Bank Building, Cleveland, Ohio 44114 and to Critchfield, Critchfield, Critchfield, and Johnson, 146 East Liberty Street, Wooster, Ohio, Counsel of Record for plaintiff-appellee, this 12th day of June, 1965.

METZENBAUM, GAINES, SCHWARTZ,
KRUPANSKY, FINLEY & STERN,
Attorneys for Defendant-Appellant.

JOURNAL ENTRY OF THE COURT OF APPEALS DISMISSING NOTICE OF APPEAL BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC.

Appeal dismissed by appellant at appellant's costs, for which judgment is rendered.

Ordered, that a special mandate be sent to said Court of Common Pleas, to carry this judgment into execution.

JOSEPH H. SILBERT, *Chief Justice.*

Dated—August 26, 1965.

ASSIGNMENT OF ERROR BY CLABER DISTRIBUTING COMPANY OF CLEVELAND, INC., DEFENDANT-APPELLEE IN THE COURT OF APPEALS FOR THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

The Trial Court erred in overruling the demurrer of defendant, and the later motion of defendant, both made on the ground that plaintiff's amended petition fails to state facts which show a cause of action because §§ 1333.27 to 1333.34, Ohio Revised Code, upon which plaintiff's action was predicated, contravene the provisions of the Ohio Constitution and are therefore invalid.

ACT OF JULY 2, 1890, CHAP. 647, 26 STAT. 209, AS AMENDED BY ACT OF AUGUST 17, 1937, CHAP. 690, 50 STAT. 673; 15 U. S. C. § 1.

§ 1. (Sherman Act as amended by Miller-Tydings Act.)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to

intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

ACT OF JULY 14, 1952, CHAP. 745, 66 STAT. 631; 15 U. S. C. § 45 (McGUIRE ACT).

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

§ 45 (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements

prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which is substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum

or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

ACT OF OCTOBER 15, 1914, CHAP. 323, SEC. 4, 38 STAT. 731, 15 U. S. C. § 15 (CLAYTON ACT).

Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

CLABER DISTRIBUTING CO. *v.* RUBBERMAID, INC.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 1310. Decided June 3, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.